Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

DIGITAL EQUIPMENT CORPORATION,

Petitioner

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent

Petition for a Writ of Certiorari to the
Supreme Court of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case arises out of this Court's decision in Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987), in which this Court held that the "multiple activities" exemption provisions of the State of Washington's Business and Occupation tax violated the Commerce Clause. After initially refusing on remand to give Tyler Pipe retroactive effect, the Supreme Court of Washington has now acknowledged in this case that taxpayers such as Petitioner Digital Equipment Corporation are entitled to retrospective relief. But the court has denied Digital a refund of the monies collected from it under what this Court held was a facially invalid taxing scheme, on the authority of a statute adopted by the Washington Legislature after the decision in Tyler Pipe. This statute was adopted for the express purpose of depriving taxpayers of their preexisting refund remedy, in the event a court ordered retrospective relief under Tyler Pipe.

The question presented is whether, under the Due Process Clause of the Fourteenth Amendment, a state may deny restitution of illegally exacted tax monies, based on a state rule of law which was adopted after the invalidation of the tax at issue, and for the express purpose of defeating taxpayer refund rights.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Washington Supreme Court were Digital Equipment Corporation and the State of Washington, by and through its Department of Revenue.

Under Supreme Court Rule 29.6, Digital Equipment Corporation states that it has no parent, and that its only non-wholly owned subsidiary is:

Digital Equipment (India) Ltd.

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PETITION FOR A WRIT OF CERTIORARI

Digital Equipment Corporation ("Digital") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Washington in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Washington is reported at 129 Wash. 2d 177, and 916 P.2d 933. It is reprinted at pages 1a-38a of the appendix to this petition. The order of the Supreme Court of Washington, denying motions for reconsideration made by Digital and by the State of Washington Department of Revenue, is unreported and reprinted at page 39a of the appendix to this petition. The relevant orders of the Washington Superior Court for Thurston County are also unreported, and reprinted at pages 40a-45a and 46a-50a of the appendix to this petition.

JURISDICTION

The judgment of the Supreme Court of Washington was entered on May 23, 1996. Timely motions for reconsideration were denied on November 8, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

This case also involves various State of Washington statutory provisions, which have been reproduced in the appendix to this petition.

STATEMENT

This case represents the culmination of a series of legal challenges to Washington State's Business and Occupation ("B&O") tax. In Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987), this Court held that the B&O tax's scheme for taxing manufactured goods violated the Commerce Clause of the United States Constitution. This case seeks to establish that Washington has a constitutional obligation to repay monies collected from Digital, under color of taxing authority which this Court determined to have been unconstitutionally exercised.

The Invalidation by This Court of the "Multiple Activities" Exemption of Washington State's Business and Occupation Tax. In 1950, the Washington Legislature amended Washington's B&O tax. Under the amendment, local manufacturers paid the manufacturing B&O tax on their interstate sales, and the retailing (or wholesaling) tax on their Washington sales; out-of-state manufacturers also paid the retailing or wholesaling tax on their Washington sales, but received no exemption for manufacturing taxes paid to another state. Tyler Pipe, 483 U.S. at 236-37. This "multiple activities" taxation scheme narrowly survived a challenge to its constitutionality in General Motors Corp. v. Washington, 377 U.S. 436 (1964). A bare majority of this Court upheld the tax; Justice Goldberg, joined by Justices Stewart and White, dissented because "'[t]he burden on interstate commerce and the dangers of multiple taxation' were apparent from the face of the statute." General Motors Corp., 377 U.S. at 459 (Goldberg, J., dissenting), as cited and quoted in Tyler Pipe, 483 U.S. at 237-38 (edits this Court's).[1]

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[1]Justice Brennan also dissented in General Motors, and on Commerce Clause grounds, but did not reach the facial discrimination issue. See 377 U.S. at 449-51 (Brennan, J., dissenting).

Twenty years later, in Armco Inc. v. Hardesty, 467 U.S. 638 (1984), this Court invalidated West Virginia's wholesale gross receipts tax. West Virginia imposed a wholesale tax on goods sold in the state; local manufacturers were exempt from this tax, but paid a separate tax on goods manufactured in the state. Citing with approval Justice Goldberg's dissent in General Motors Corp. v. Washington, this Court struck down West Virginia's tax as facially invalid under the Commerce Clause. 467 U.S. at 642-46.

Following Armco, a group of manufacturers[2] challenged Washington's "multiple activities" taxation scheme, contending it could no longer withstand constitutional scrutiny. The Supreme Court of Washington rejected this challenge, on the grounds that Armco should not be read to "effectively overrule . . ., sub silentio, . . . 30 years of [United States] Supreme Court doctrine":

> Due to factual differences between the West Virginia tax challenged in Armco . . . and the Washington tax, we do not believe the United States Supreme Court is requiring us to forge new [C]ommerce [C]lause doctrine and disregard earlier decisions not overruled.

National Can Corp. v. Dept. of Revenue, 105 Wash. 2d 327, 715 P.2d 128, 131 (1986), amended, 732 P.2d 134 (1987); see also Tyler Pipe Industries, Inc. v. Dept. of Revenue, 105 Wash. 2d 318, 715 P.2d 123 (1986).[3]

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[2]Petitioner Digital Equipment Corporation was not a party to this challenge.

[3]National Can involved 53 separate refund actions, brought by three types of claimants: (1) in-state manufacturers who manufactured their products in Washington, and sold them out of state; (2) out-of-state manufacturers who manufactured their products outside Washington and sold them in state; and (3) out-of-state manufacturers who manufactured products in Washington for sale out of state, and who also manufactured products outside

(continued...)

This Court reversed, holding that Armco did require the invalidation of Washington's tax, as a facial violation of Commerce Clause strictures:

> In explaining why the [West Virginia] tax was discriminatory on its face, we expressly endorsed the reasoning of Justice Goldberg's dissenting opinion in General Motors Corp. v. Washington . . . .
>
> . . . .
>
> Our square reliance in Armco on Justice Goldberg's earlier dissenting opinion is especially significant because that dissent dooms appellee's [i.e., Washington's] efforts to limit the reasoning of Armco to the precise statutory structure at issue in that case.
>
> . . . .
>
> To the extent that this conclusion is inconsistent with the Court's ruling in the General Motors case, that case is overruled.

Tyler Pipe, 483 U.S. at 241, 248.[4] This Court did not expressly

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[3](...continued)
Washington for sale in state. National Can, 715 P.2d at 129-30. The taxpayer in the companion case of Tyler Pipe Industries, Inc. v. Dept. of Revenue, 105 Wash. 2d 318, 715 P.2d 123 (1986), fell within the second category. Tyler Pipe Industries, Inc., the plaintiff in the companion case before the Washington Supreme Court, then became the lead party in the proceedings before this Court.

[4]In a following footnote, this Court stated that "[i]n view of our holding on the discrimination issue, we need not reach the claim of local state manufacturers selling to interstate markets that (continued...)

reserve the question of whether its decision should apply only prospectively, but remanded to the Washington Supreme Court for determination of the remedy to be provided the successful taxpayer litigants. Tyler Pipe, 483 U.S. at 251-53.[5]

The Washington Legislature's Response to the Invalidation of the "Multiple Activities" Taxation Scheme. Even before this Court's decision in Tyler Pipe, the Washington Legislature took steps to minimize the fiscal consequences of an adverse ruling. At the time this Court decided Armco, Washington provided the retrospective remedy of a full refund for the illegal exaction of tax monies. See Revised Code of Washington ("RCW") 82.32.060 (reprinted at pages 59a-60a of the appendix to this petition).[6] Following Armco, the Washington Legislature amended the multiple activities taxation scheme, and authorized a system of compensating credits to go into effect if the tax were invalidated on Commerce Clause grounds. As introduced in the 1985 regular session of the Legislature, Substitute Senate Bill ("SSB") 3678 proposed to provide a credit against taxes paid to another state "with respect to the sales of the products so extracted or manufactured in this state[,]" for "tax reporting periods after July 1, 1985." SSB 3678 (subsection (4)) (SSB 3678 is reprinted at pages 51a-52a of the appendix to this petition). This proposal was revised, and the measure as adopted provided a credit only if "a court of competent jurisdiction, in a judgment not

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[4](...continued)
the tax scheme does not fairly apportion tax liabilities between Washington and other states." See 483 U.S. at 248, n.16.

[5]Because "[c]ompliance with [the Court's] . . . holding on the discrimination issue . . . would not necessarily preclude the continued assessment of a wholesaling tax[,]" this Court reached -- and rejected -- the Due Process Clause challenge raised by the taxpayer in the companion case to the consolidated National Can refund actions. See Tyler Pipe, 483 U.S. at 248-51.

[6]Washington's tax remedy structure is described more fully, infra, at 7-8.

subject to review," determined that the multiple activities exemption "result[ed] in an unconstitutional discrimination against interstate or foreign commerce[,]" and "that relief [was] . . . appropriate for any tax reporting periods either before or after the effective date of th[e] 1985 [amendments] . . . ." 1985 Washington Laws, Reg. Sess., ch. 190, § 1 (subsection (4)) (Chapter 190, Section 1 is reprinted at pages 53a-54a of the appendix to this petition).

The Legislature, however, did not provide for these credits to be substituted for refunds as the sole remedy for any illegal taxation found to have been conducted under the multiple activities scheme. Two years later, this Court issued its decision in Tyler Pipe invalidating the scheme. In response, the Washington Legislature met in a special session and made additional changes to the state's B&O tax system, including to the remedy provisions that had been adopted two years before. Because this Court had left the question of remedy for the Washington Supreme Court on remand, the Legislature structured the new remedy provisions to account for the resulting uncertainty about the ultimate scope of court-ordered relief on remand. This time, the Legislature expressly declared its intent that the credit remedy should be the exclusive remedy for illegal taxation if Tyler Pipe was applied retroactively:

> If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that relief is appropriate for any tax reporting periods before the effective date of this act, in respect to RCW 82.04.440 [i.e., the multiple activities exemption statute] as it existed before the effective date of this act, it is the intent of the legislature that the credits provided in RCW 82.04.440 as amended by section 2 of this act shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credits.

1987 Washington Laws, 2d Ex. Sess., ch. 3, § 3 (Chapter 3 is reprinted at pages 55a-58a of the appendix to this petition).

Digital's Suit for a Refund of Taxes Paid Under the "Multiple Activities" Taxation Scheme, Following Its Invalidation by This Court. Digital is a Massachusetts corporation, that designs, manufactures, sells and services computers, associated peripheral equipment, and related software and supplies. During the tax reporting periods in question, Digital manufactured products and product components outside Washington, and sold these manufactured goods in Washington to end-users (consumers) as well as to persons who resold the goods (wholesalers); Digital paid retailing and wholesaling B&O taxes on these transactions, estimated to total $1,706,877.[7] On August 27, 1987, Digital filed suit in the Superior Court for Thurston County, seeking a refund of these taxes, which were paid prior to the issuance of Tyler Pipe.

As stated, when Digital paid the taxes at issue, Washington provided only the postdeprivation remedy of a refund for unlawfully exacted taxes. See RCW 82.32.060. Under Washington law, a court may provide relief from illegal taxation only after the disputed taxes have been paid. RCW 82.32.180, reprinted at pages 63a-64a of the appendix to this petition.[8] A

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[7]This amount has not been verified by the Washington State Department of Revenue, and if Digital is held to be entitled to a refund of the taxes at issue, the Department will have the right to verify the claimed amount prior to payment. Digital will also receive interest on any refunded taxes at the rate established by RCW 82.32.060.

[8]Although RCW 82.32.150 (reprinted at page 62a of the appendix to this petition) provides for the possibility of injunctions in tax relief suits, the Supreme Court of Washington has held such an injunction generally will not issue because Washington "provides the legal remedy of a refund suit." Tyler Pipe Industries, Inc. v. Department of Revenue, 96 Wash. 2d 785, 638 P.2d 1213, 1216 (1982). And while Washington also has an administrative procedure for contesting tax assessments without

(continued...)

penalty of up to twenty percent is imposed for a deficient or delinquent tax payment. RCW 82.32.090(1), reprinted at pages 60a-61a of the appendix to this petition. The Department of Revenue may issue a tax warrant any time a tax is fifteen days overdue; the warrant is filed in the Superior Court and becomes an automatic judgment against the taxpayer. RCW 82.32.210, reprinted at pages 64a-66a of the appendix to this petition. The Department may execute upon this warrant (including seizing and selling property of the taxpayer), and may revoke a taxpayer's certificate of registration if a warrant is not paid within thirty days. RCW 82.32.220, reprinted at pages 66a-67a of the appendix to this petition. Under Washington law, it is unlawful for a corporation to do business without a certificate of registration, and it is a Class C felony to violate this requirement. RCW 82.32.290(1), (2), reprinted at pages 67a-68a of the appendix to this petition.

The Washington Supreme Court's Initial Denial of Retrospective Relief, on Remand From This Court in Tyler Pipe. The year after this Court's decision in Tyler Pipe, the Washington Supreme Court issued its decision on the remedy issue. In National Can Corp. v. Department of Revenue, 109 Wash. 2d 878, 749 P.2d 1286 (1988),[9] the court held that Tyler

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[8](...continued)
first paying the disputed tax, the Washington Supreme Court has ruled that administrative agencies may not rule on the constitutionality of statutes. Compare RCW 82.32.160 and Washington Administrative Code 458-20-100 (the former is reprinted at pages 62a-63a of the appendix to this petition) with Yakima County Clean Air Authority v. Glascam Builders, Inc., 85 Wash. 2d 255, 534 P.2d 33, 34 (1975).

[9]Tracking the prior decisions of the Washington Supreme Court issued during the extended course of the multiple activities exemption litigation is made difficult by the repetitive party nomenclature -- particularly the recurrence of lead taxpayer parties with the term "Can" in their names. Digital will refer to the
(continued...)

Pipe would be given only prospective effect, thereby denying any relief for taxes paid prior to the Tyler Pipe judgment. See 749 P.2d at 1288. Acknowledging that this Court's decision in Griffith v. Kentucky, 479 U.S. 314 (1987), had "reworked" the test for retroactive application in criminal cases, the Washington Supreme Court nonetheless held that "the inquiry in civil cases is still controlled" by the three factor balancing test set forth in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). See 749 P.2d at 1288. The Supreme Court of Washington held that, under the Chevron Oil test, the decision in Tyler Pipe should be given only prospective effect:

First, the court found Tyler Pipe had "establish[ed] new principles of law." 749 P.2d at 1288.

Second, the court found that the purpose of the Commerce Clause would not be furthered by retroactive application, "since whatever chill was imposed on interstate trade is in the past and the Legislature has enacted law [sic] to attempt to comport with the new commerce clause taxation laws announced in Tyler [i.e., the 1987 amended credit law]." 749 P.2d at 1291.

Third, the court found it would be inequitable to give Tyler Pipe retroactive application, because "the expenditures made from this revenue during the many years for which refunds are sought cannot be undone, and reimbursement at this point would pose a significant hardship upon the State's existing financial

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[9](...continued)
Washington Supreme Court's 1986 decision (reversed by this Court in Tyler Pipe) as "National Can I," to the court's post-Tyler Pipe remedy decision as "National Can II," and to the (yet to be discussed) decision upholding the validity of the 1987 credit law (against a variety of federal and state law challenges not directly relevant to this case) as "American Can."

requirements." 749 P.2d at 1293 (citing Salorio v. Glaser, 93 N.J. 447, 461 A.2d 1100, cert. denied, 464 U.S. 993 (1983)).[10]

This Court denied the Tyler Pipe taxpayers' petition for a writ of certiorari. See order reported at 486 U.S. 1040 (1988).[11] Two years later, the Washington Supreme Court refused refunds for the six week period between this Court's Tyler Pipe decision (which issued June 23, 1987) and the date the Legislature's amended credit legislation went into effect (August 11, 1987). See American Nat'l Can Corp. v. Department of Revenue, 114 Wash. 2d 236, 787 P.2d 545, 546 (1990). Although the resolution of this claim for "interim period" refunds turned solely on questions of state constitutional law, see 787 P.2d at 553, the Washington Supreme Court's rejection of refunds was expressly based on its finding that the Legislature intended the credit law to apply

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[10]The court estimated the illegally collected taxes in question at $56 million for the pending cases, and in excess of $423 million for the period 1980-84. See 749 P.2d at 1293. Although the court did not explain why the period 1980-84 was relevant, given Tyler Pipe was decided in 1987 and Washington has a four year statute of limitations on refund claims, the reference is probably explained by the fact that refund claims had been filed immediately after Armco, seeking refunds for taxes paid back to 1980.

[11]Two years before, the Supreme Court of Appeals of West Virginia had refused to give retroactive effect to this Court's decision in Armco (a refusal cited with approval by the Washington Supreme Court in National Can II); in 1990, this Court reversed the West Virginia Supreme Court of Appeals, and held Armco should be given retroactive effect. See Ashland Oil, Inc. v. Rose, 177 W. Va. 20, 350 S.E.2d 531 (1986), rev'd after remand sub nom. Ashland Oil, Inc. v. Caryl, 497 U.S. 916, 918 (per curiam) ("Applying the view of retroactivity delineated by either the dissent or the plurality in American Trucking Assn's, [Inc. v. Smith, 496 U.S. 167 (1990),] we must reverse the state court's decision").

retroactively in the event a court ordered a remedy for a taxing period prior to the credit law's effective date:

> Section three of the law [i.e., the 1987 credit law] shows that the Legislature intended to apply relief retroactively in the event of a court-ordered remedy notwithstanding the effective date of the act. . . .
>
> Given the holding of the Tyler [Pipe] Court, some relief is clearly appropriate. Our determination that some relief is appropriate triggers both the 1985 and 1987 legislation.

787 P.2d at 552.[12] This Court denied the American Can taxpayers' petition for a writ of certiorari. See order reported at 498 U.S. 880 (1990).[13]

Proceedings in This Case Before the Washington Trial Court. This case remained dormant until 1994, when Digital moved for partial summary judgment on its refund claim, and the Department of Revenue filed a cross-motion for a summary judgment of dismissal.[14] The ensuing controversy before the Thurston County Superior Court principally concerned whether the Washington Supreme Court's decision in National Can II had been fatally undermined by subsequent decisions of this Court addressing the retroactive effect of the Court's decisions in civil

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[12]The taxpayers also challenged the prospective application of the credit law, on various state and federal grounds, which the Washington Supreme Court also rejected. See 787 P.2d at 553.

[13]Most of the parties in American Can were also parties in Tyler Pipe, and in the National Can II remand proceeding. Petitioner was not a party to any of these proceedings.

[14]Digital's was one of many actions filed in the wake of Tyler Pipe. After the Washington Supreme Court denied retrospective relief in National Can II, some of these cases were dismissed. The Washington State Department of Revenue, however, failed to pursue the dismissal of Digital's case and several other cases.

cases.[15] Digital contended these subsequent decisions had repudiated Chevron Oil's three-factor balancing test, substituting a presumption of retroactivity which might be overcome only by an express reservation of the retroactivity question in the decision at issue: Because this Court did not expressly reserve retroactivity in Tyler Pipe, the decision therefore now had to be given retroactive effect under the governing "express reservation" test. The Thurston County Superior Court, however, held Chevron Oil still applied to what the court called cases of "pure prospectivity," declaring that Tyler Pipe was such a case. See court's letter opinion (the letter opinion is reprinted at pages 40a-45a of the appendix to this petition). The court denied Digital's motion, granted the Department's motion, and dismissed Digital's action.

Proceedings in This Case Before the Washington Supreme Court. The Supreme Court of Washington granted direct review of the Superior Court's decision. On May 23, 1996, the court affirmed the dismissal of Digital's refund claim. In his opinion for the court, Justice Charles Smith agreed with Digital that National Can II had been fatally undermined by this Court's subsequent retroactivity decisions, and that Tyler Pipe therefore had to be given retroactive effect. 916 P.2d at 936-38 (pages 5a-11a of the appendix to this petition).[16] The court

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[15]E.g., Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991).

[16]Justice Smith's opinion was joined by Justices James Dolliver and Charles Johnson. Chief Justice Barbara Durham, in a concurring opinion joined by Justice Gerry Alexander, agreed that National Can II should be overruled in light of this Court's subsequent retroactivity decisions. See 916 P.2d at 941-42, n.1. Chief Justice Durham, however, believed that the relevant decision of this Court to be applied retroactively was Armco, not Tyler Pipe. Id. at 942 n.1 (pages 20a-21a of the appendix). Justice Richard Guy, joined by Justices Barbara Madsen, Roselle Pekelis (continued...)

acknowledged that Digital therefore "conceivably might be entitled to some type of relief. . . ." Id. at 938 (page 12a of the appendix to this petition). But the court did not agree that due process compelled a refund to Digital of the monies illegally exacted from it during the pre-Tyler Pipe taxing periods at issue.

Consistent with its prior ruling in American National Can, the court held that the Washington Legislature "intended that the [1987 credit] law would operate retroactively in the event of a court-ordered remedy" and that the Legislature "also intended that these tax credits would be the exclusive remedy available for those entitled to relief." Id. at 935 (page 3a of the appendix to this petition) (emphasis added) (footnotes omitted). The court then held that the Legislature acted consistent with due process when it substituted the new credit remedy for the usual refund remedy -- a substitution that the court expressly acknowledged was only to take effect for pre-Tyler Pipe tax reporting periods if a court subsequently held that Tyler Pipe must be given retroactive effect.[17]

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[16](...continued)
(pro tem) and Phillip Talmadge, dissented from the decision to overrule National Can II, but agreed with Justices Smith, Dolliver and Johnson that the issue was whether to apply Tyler Pipe retroactively. See 916 P.2d at 947-49 (pages 32a-37a of the appendix). Thus, a majority of the court agreed that National Can II should be overruled on the issue of retroactivity (principally in light of this Court's decisions in Beam and Harper), and a majority (albeit a different one) agreed that overruling National Can II would give retroactive effect to Tyler Pipe.

[17]In rejecting Digital's due process challenge to this "after the fact" elimination of the company's refund remedy, the court discussed this Court's decision in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990), but did not address this court's later decisions in Reich v. Collins, 513 U.S. ___, 130 L. Ed. 2d 454 (1994) or Reynoldsville Casket Co. v. Hyde, 514 U.S. ___, 131 L. Ed. 2d 820 (1995) -- even though
(continued...)

The court also asserted that consideration of the remedy issue had been rendered "acutely academic":

> . . . when counsel for Digital during oral argument conceded that Digital had not been "double taxed" and consequently suffered no injury under the former unconstitutional tax scheme.

Id. at 940 (page 16a of the appendix to this petition) (footnote omitted).

Digital timely moved for reconsideration.[18] First, Digital pointed out it had not conceded the absence of injury. According to the court:

> One of the justices asked *"In your particular situation, did your client actually pay out-of-state gross receipt taxes on its manufacturing operations?"* Counsel for Digital then replied *"We were not actually double taxed."*

Id. (italics the court's). The oral argument transcript[19] showed counsel did not make this admission:

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[17](...continued)
both cases were relied upon by Digital in briefing and at oral argument.

[18]The Department of Revenue also moved for reconsideration, asking the court to reconsider its ruling on the retroactivity issue.

[19]Oral arguments before the Washington Supreme Court are videotaped and transcripts are prepared upon counsel's request. Digital's counsel requested a transcript be prepared, and submitted a copy in support of reconsideration. In addition to the portion quoted, the issue of Digital's injury was further addressed by Digital's counsel, and those remarks are also reprinted in the appendix to this petition at pages 69a-74a.

> [Counsel for Digital]: We were not actually double taxed, but that goes to the question of remedy, Your Honor. . . .
>
> . . . Your Honor's question introduces a second issue, and that's the nature of the harm. . . .
>
> Now, as to the question of injury, I think we're missing a fundamental point here if we buy into the state's analysis that somehow we're asking for a windfall, to be given back money when we weren't injured.
>
> We most certainly were injured. Digital's money was taken under color of taxing authority later held to be unconstitutional.

See excerpts of oral argument transcript reprinted in the appendix to this petition, at page 70a (emphasis added).[20]

Second, Digital urged the court to reconsider in light of this Court's decisions in Reich and Reynoldsville, which had not been addressed in the court's opinion or Chief Justice Durham's concurrence.[21] Digital also observed that, since the close of briefing and argument, the court had granted retroactive refund relief to local taxpayers in a suit challenging the constitutionality of a municipal tax. See Covell v. City of Seattle, 127 Wash. 2d 874, 905 P.2d 324, 333 (1995). Digital suggested that the grant of retroactive refund relief in Covell, combined with the denial of

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[20]Chief Justice Durham also disputed the implication of Justice Smith's opinion for the Court, that Digital needed to suffer double taxation in order to demonstrate injury. See 916 P.2d at 946, n.6 (pages 27a-28a of the appendix). Justice Guy's dissent did not address the issue.

[21]Justice Guy's dissent cited Reynoldsville's discussion of retroactivity, but did not address either Reich's or Reynoldsville's analysis of the constitutional limits placed on a state's power to deny retroactive relief.

such relief in this case, could give rise to a violation of the Privileges and Immunities Clause. See generally Hooper v. Bernalillo Cy. Assessor, 472 U.S. 612 (1985), cited in Digital's reconsideration motion.

On November 8, 1996, the court denied any reconsideration; the court did not give any reasons for its ruling, and also did not modify any portion of its decision. App. 39a.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the constitutionality of state efforts to evade refunding illegally collected taxes.

I. THE DECISION OF THE WASHINGTON SUPREME COURT CONFLICTS WITH THIS COURT'S DUE PROCESS CLAUSE PRECEDENTS.

A. This Court's Decisions Establish That Taxpayers Have a Constitutionally Protected Right to a Refund of Illegally Exacted Tax Monies.

The history of actions to recover illegally collected state taxes shows a deep-rooted reluctance on the part of state authorities, including state courts, to refund such monies. See, e.g., P. Tatarowicz, "Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause," 41 Tax Law. 103 (1987); O. Field, "The Recovery of Illegal and Unconstitutional Taxes," 45 Harv. L. Rev. 501 (1931-32). This Court's decisions dealing with refund claims for state and federal taxes illustrate the tension between individual and state interests inherent in such disputes. On the one hand, there is the fundamental principle that:

> [t]he obligation to do justice rests upon all persons, natural and artificial, and if a county [i.e., a taxing authority] obtains the money or property of others without authority,

> the law, independent of any statute, will compel restitution or compensation.

Marsh v. Fulton Cy. Board of Supervisors, 77 U.S. (10 Wall) 676, 684 (1871). On the other hand, the practical concern for disrupting the process of collection of public revenues has sometimes moved this Court to express the view that remedies for improper taxation must be generally subject to wide-ranging modification by legislative authorities. See, e.g., Collector of Internal Revenue v. Hubbard, 79 U.S. (12 Wall) 1, 14 (1871).

The history of tax refund jurisprudence, however, also discloses a shift by this Court in favor of protecting taxpayer rights. Although the right of taxpayers to some sort of relief was acknowledged early on, initially this right was rather severely circumscribed by an evident reluctance to interfere in legislative choices defining -- and usually limiting -- the scope of such remedies. Compare Collector of Internal Revenue v. Van Arsdale, 82 U.S. (15 Wall) 75, 77 (1872) ("Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding") with Hubbard, 79 U.S. at 14 ("Remedies of the kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the law-maker, as the taxpayer cannot have any vested right in the remedy granted by Congress for the correction of an error in taxation"). But, starting no later than the decision in Atchison, Topeka & Santa Fe Railway Co. v. O'Connor, 223 U.S. 280 (1912), this Court began to move away from the traditional view so deferential to the interests of the tax collector, to embrace a doctrine more solicitous of taxpayer rights.

In the Atchison, Topeka & Santa Fe Railway case, the issue was whether the taxpayer (the railroad) had paid the disputed tax under "duress," which at the time was a well-nigh universal precondition for refund relief. 223 U.S. at 285.[22] The railroad

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[22]Although Digital questions whether the traditional (continued...)

challenged a tax levied by the state of Kansas, of two cents upon each thousand dollars of the company's capital stock. Id. Kansas did not dispute the tax had been unconstitutionally assessed and collected from the railroad, but did claim the railroad had paid the tax voluntarily and therefore was not entitled to the remedy of a refund. Id. In rejecting this claim, Justice Holmes stated for a unanimous court:

> It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course we are speaking of those cases where the state is not put to an action if the citizen refuses to pay. In these latter [cases,] he can interpose his objections by way of defense, but when, as is common, the State has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made. But even if the State is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defense in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms.

Id. at 285-86 (citations omitted) (emphasis added).

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[22](...continued)
requirement of duress can any longer be squared with the modern due process basis of tax refund jurisprudence, Digital notes that issue need not be addressed in this case, because (as is noted, infra, at n.23), Digital has satisfied the "duress" requirement.

The Court found the railway did not voluntarily pay the taxes at issue, given the company would forfeit its right to do business within the state of Kansas, and suffer a penalty of ten percent each six months until the taxes were paid. Id. at 286.[23] The Court also rejected the state's claim that the railway's monies somehow became the state's, merely by the act of collection:

> It is said that the money as soon as collected belonged to the state. Very likely it would have but for the plaintiff's claim, assuming it to remain an identified trust fund; but the plaintiff's claim was paramount to that of the State . . .

Id. at 287 (emphasis added).

Within the next several years, the decision in the Atchison, Topeka & Santa Fe Railway case was followed by a series of decisions, confirming what Justice Holmes' language plainly implied -- fundamental principles of due process circumscribe the power of taxing authorities to refuse a refund of taxes illegally exacted:

- In Ward v. Love County Board of Commissioners, 253 U.S. 17 (1920), this Court reversed the Oklahoma Supreme Court's refusal to award a refund for an unlawful tax. This Court explained the state's duty to remit the tax as follows:

> It is a well settled rule that "money got through imposition" may be recovered back; and, as this court has said on several occasions, "the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." . . . . To say that the county could

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[23]This holding probably explains why the Department, given Washington's equally onerous penalty scheme (see pp. 7-8, supra), has never claimed in this case that Digital "voluntarily" paid the taxes at issue.

> collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course, this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State.

253 U.S. at 24 (citations omitted).

- In Montana National Bank v. Yellowstone County, 276 U.S. 499 (1928), this Court again reversed a refusal to award a refund of an unlawful tax. There, the Montana Supreme Court had overruled its prior decision barring the collection from state chartered banks of a tax on bank shares which had been collected from federally chartered banks, but then refused to award a refund because state tax authorities had declined to collect the tax from state chartered banks in reliance on the Montana Supreme Court's prior decision. 276 U.S. at 504-05. This Court held that the change in state law could not deprive the taxpayer of a refund of the wrongfully collected taxes:

> It is true that the state supreme court in the present case expressly repudiated the construction theretofore put by it upon the state statutes . . . . But that does not cure the mischief which had been done under the earlier construction. That construction had already been acted upon by the taxing officials and the application thus made of the statutes had given rise to the present cause of action and an undoubted right to recover thereon. The statutes, as thus construed and applied to the concrete facts of the case, were invalid; and this is enough to justify the challenge here under consideration. . . . Plaintiff in error cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which . . . leaves the monies thus exacted in the public treasury.

276 U.S. at 504.

• In Carpenter v. Shaw, 280 U.S. 363 (1930), a case analogous to Ward, this Court reversed another refusal to award a refund of an unlawful tax, holding that:

> a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment.

280 U.S. at 369.

• In Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931), this Court reversed another refusal to award a refund of an unlawful tax (in that case, a claim only for the discriminatory excess collected from the complaining taxpayers). This Court held that the mere power of the state to rectify the discrimination, by retroactive collection from those who were taxed at the lesser rate, did not relieve the state of its constitutional obligation to pay the claimed refund:

> . . . a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. . . . Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.

284 U.S. at 247 (citations omitted).[24]

After this series of decisions, this Court did not "ha[ve] occasion . . . to explain the scope of a state's obligation to provide retrospective relief as part of its postdeprivation procedure" until McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990). See 496 U.S. at 32. But as this Court made

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[24]A similar claim had been made, and also rejected, in Montana National Bank. See 276 U.S. at 505.

clear in McKesson, the Court's "approach today is rooted firmly" in the precedents just described. Id. This Court stated in McKesson:

> Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause.

Id. at 36 (footnote omitted). McKesson thus makes plain that due process places substantial limits on a state's ability to refuse a refund. If the state affords a predeprivation remedy that satisfies due process (e.g., the right to a precollection administrative remedy, in which constitutional issues may be addressed), then the issue should not arise. See id. at 38, n.21. But if no such predeprivation opportunity exists, then "the Due Process Clause . . . obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." Id. at 31 (footnote omitted). In providing such relief, a state must either award full refunds to those burdened by an unlawful tax or issue some other order that "create[s] in hindsight a nondiscriminatory scheme." Id. at 40.

In McKesson, the validity of a state's choice of a specific remedy was not at issue, because the state (Florida) had not yet elected between a refund or an equivalent compensatory measure. The sole issue before the Court was whether, given the retroactive effect of this Court's invalidation of discriminatory liquor excise tax schemes in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), a state could nonetheless refuse to provide retroactive relief.[25] But in Reich v. Collins, 513 U.S. ___, 130 L. Ed. 2d 454 (1994), this Court did address an attempt by a state to change its remedy rules after the fact, to avoid paying a refund. The Georgia Supreme Court had refused a refund remedy on the

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[25]The taxpayers in McKesson also only claimed retrospective relief for the discriminatory effect of Florida's liquor excise tax. 496 U.S. at 25.

grounds that Georgia's predeprivation remedies were the exclusive remedy for cases involving challenges to taxes on grounds of invalidity (constitutional or otherwise). 130 L. Ed. 2d at 457-58. This Court held that the Georgia court's decision constituted a departure from settled principles of Georgia law (under which taxpayers would reasonably have assumed a refund was available, and therefore would not have availed themselves of any predeprivation procedures), and that the Due Process Clause forbade such an unfair attempt to reconfigure taxpayer remedy schemes "in midcourse -- to 'bait and switch,' as some have described it." Id. at 459.

In short, Reich establishes that due process does limit a state's ability to make after-the-fact changes in their remedy scheme, to avoid paying a refund of illegally exacted tax monies. Most recently, in Reynoldsville Casket Co. v. Hyde, 514 U.S. ___, 131 L. Ed. 2d 820 (1995), this Court dealt with the closely related issue of when a state may refuse to give retroactive effect to a decision of this Court in a civil case, whose retroactivity was not expressly reserved. This Court addressed when it would be appropriate for a state to refuse refunds "under a taxing statute that this Court later holds unconstitutional":

> Retroactive application of the Court's holding would seem to entitle the taxpayers to a refund of taxes. But, what if a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity . . . nonetheless barred the taxpayers' refund suit? . . . . Depending upon whether or not this independent rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim.

131 L. Ed. 2d at 828-29. In other words, a state may not refuse a refund, based on a rule of state law adopted after the fact and for the express purpose of defeating a refund, because the result would defeat the state's restitutionary obligation which lies at the foundation of this Court's tax refund due process jurisprudence.

B. The Washington Supreme Court's Retroactive Application of the Credit Law for the Express Purpose of Defeating Digital's Refund Rights Conflicts With This Court's Decisions.

The 1987 credit law is the only alternative to a refund proffered by the State of Washington. The Department has never suggested that the State will (or even can, under state law) seek to impose a retroactive, "compensatory" tax. Nor would such a tax be responsive to Digital's injury, which is the taking of its money under color of state taxing authority that has been invalidated on its face. Nonetheless, the credit law has been applied in this case to avoid refunding to Digital the monies illegally collected from it during the pre-Tyler Pipe taxing periods -- monies which Digital would have been entitled to receive as a refund prior to the enactment of the credit law.

This result conflicts with this Court's tax refund due process jurisprudence. First, the credit law is the antitheses of a preexisting, independent rule of state law having nothing to do with retroactivity: The law was passed after Tyler Pipe and for the express purpose of defeating the payment of refunds if a court ever required retroactive relief under Tyler Pipe. Second, the credit law's application disregards the long-standing principle that monies illegally collected are not the property of the taxing authority: They remain the property of the taxpayer, and the taxing authority has the obligation to make restitution of those funds.

As Chief Justice Durham recognized in her concurrence below, Digital was injured even though the company did not pay a double tax for which it would be entitled to relief under the 1987 credit law. 916 P.2d at 945, n.6 (pages 27-28a of the appendix to this petition). The credit law does nothing to address that injury, and its application deprives Digital of redress for the injury of having its monies taken under a facially invalid tax scheme.[26]

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[26]In McKesson, this Court indicated that, in some Commerce

(continued...)

The Washington Supreme Court's application of the credit law to Digital therefore conflicts with this Court's decisions.

II. THE ISSUES RAISED BY THE WASHINGTON SUPREME COURT'S DECISION ARE RECURRING AND IMPORTANT.

This Court noted in McKesson that for some time the Court had no occasion to address due process issues in tax challenge cases, because the Court developed a practice of referring the question of remedy back to the state courts for their disposition. 496 U.S. at 32 n.16. This practice was closely intertwined with the Court's experiment with determining the retrospective effect of decisions on a case-by-case basis. Under the resulting regime of multifactor balancing exemplified by Chevron Oil Co. v. Huson, it made sense for this Court to abstain from addressing the remedy issue, since the state court was often afforded the first opportunity to determine a decision's retrospective effect.

This Court's decisions in Beam, Harper, and Reynoldsville make plain that the experiment in case-by-case retrospectivity has come to an end, in the civil as well as the criminal sphere.[27]

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[26](...continued)
Clause context circumstances, due process could be satisfied by collecting back taxes from in-state competitors, or by refunding the difference between the tax paid and the tax that would have been assessed had the out-of-state taxpayer been taxed at the same rate as in-state competitors. 496 U.S. at 40-41. As stated, the Department has never suggested it could -- much less would -- consider collecting back taxes. This case also presents the question of a remedy for a facially invalid taxing scheme, not just for the discriminatory effect of a tax as applied to specific tax transaction, which triggers the restitutionary obligation imposed by Due Process Clause requirements established by this Court's precedents.

[27]In Harper, this Court explained that its adoption of the (continued...)

With the end of the Chevron Oil era, the issue of remedy has acquired new urgency. Bluntly put, states used Chevron Oil's multifactor balancing approach to avoid granting refunds in federal question tax challenge cases, repeatedly striking the balance against the taxpayer and in favor of the state treasury, and thereby effectively gutting taxpayer rights.[28] Nor has the abolition of

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[27](...continued)
express reservation approach (under which a decision must be given retroactive effect unless the issue has been expressly resolved by the decision in question) was impelled by the difference between judicial and legislative action under a constitutional scheme that limits the exercise of judicial power to individual cases and controversies. See Harper, 509 U.S. at 104 (adopting Justice Harlan's critique of case-by-case retrospectivity, set forth in separate opinions in Desist v. United States, 394 U.S. 244 (1969), and Mackey v. United States, 401 U.S. 667 (1971)).

[28]See, e.g., Kentucky Revenue Cabinet v. CSC Oil Co., Inc., 851 S.W.2d 497, 499-502 (Ky. App. 1993) (applying Chevron Oil to deny refunds; purporting to distinguish the applicability of James B. Beam Distilling Co.); First of McAlester Corp. v. Oklahoma Tax Comm'n, 709 P.2d 1026, 1032-37 (Okla. 1985) (applying the "recent . . . vast body of case law" and the "particularly instructive" decision in Chevron Oil, to deny refunds); Salorio v. Glaser, 93 N.J. 447, 461 A.2d 1100, 1108-12, cert. denied, 464 U.S. 993 (1983) (applying the "modern view" concerning the invalidity of unconstitutional acts, including Chevron Oil, to deny refunds). The reluctance of states to let go of the Chevron Oil "escape hatch" was underscored by the need for this Court, in the remedy litigation triggered by Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989), to overturn the refusal of several states to give Davis retroactive effect -- notwithstanding the Court's decisions in Griffith and Beam. See, e.g., Sheehy v. Montana Dept. of Revenue, 250 Mont. 437, 820 P.2d 1257 (1991) (applying Chevron Oil), vacated, 509 U.S. 916 (1993); Duffy v. Wetzler, 174 A.D.2d 253, 579 N.Y.S.2d 684 (continued...)

case-by-case retrospectivity eliminated the threat to taxpayer rights, because states remain averse to returning to taxpayers the fruits of illegal tax collections -- even though, as this Court recognized 84 years ago, those monies are the taxpayer's and are not transformed into the property of the state by the mere act of collection when that act is done without proper authority. Atchison, Topeka & Santa Fe Ry., 223 U.S. at 287.

As this case shows, if deprived of the ability to "balance away" the obligation to make restitution, states will resort to the equally effective device of substituting a lesser remedy for the express purpose of evading their obligation to make restitution. Indeed, the Supreme Court of Washington denied Digital a refund, after ordering refunds for local taxpayers who paid an invalid municipal tax[29] -- a reflexive preference for local over interstate interests which was the concern of Justice Holmes, when he wrote:

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[28](...continued)
(applying Chevron Oil), appeal dismissed, 79 N.Y.2d 976, 583 N.Y.S.2d 190, 592 N.E.2d 798 (1992), but judgment vacated, 509 U.S. 917 (1993); Harper v. Virginia Dept. of Taxation, 242 Va. 322, 410 S.E.2d 629 (1991), rev'd, 509 U.S. 86 (1993) (holding Davis must be given retroactive effect, and vacating refusals to do so based on Chevron Oil and related authority). This result should have come as no surprise, given the historic allergy of state courts to requiring the disgorgement of illegally exacted tax monies.

[29]See Covell v. City of Seattle, supra, 905 P.2d at 333. Although Digital believes the combination of the decision in Covell and this case raises serious concerns under the Privileges and Immunities Clause, Digital does not seek review of that issue. But the fact of the grant of refunds to local taxpayers in Covell, contemporaneous with the denial of refunds to an out-of-state taxpayer in this case, does shed an illuminating light on the local preferences that frequently animate state court decisions on these issues.

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.

O.W. Holmes, Jr., Collected Legal Papers at 295-96 (New York: Harcourt Brace & Howe 1920). Here, the Washington Supreme Court's willingness to deprive an out-of-state taxpayer of restitution for illegally exacted taxation underscores how deprivation of a taxpayer's due process rights can also endanger Commerce Clause protections, because the court's action shows states will be able to employ the law of remedies to frustrate effective relief for facial discrimination against interstate commerce.[30]

This case provides the appropriate and needed vehicle for putting an end to such practices.

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[30]This Commerce Clause element was not present in V-1 Oil Co. v. Idaho Petroleum Clean Water Trust Fund, 128 Idaho 890, 920 P.2d 909 (1996), which involved the refusal by the Supreme Court of Idaho to order a refund, following the court's decision upholding the validity of the collection of a state tax against a state constitutional challenge while finding that the state constitution required that the money collected had to be appropriated in a different manner. This Court denied the taxpayers' petition for a writ of certiorari. See order denying petition in Supreme Court Cause No. 96-513 (Dec. 2, 1996).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 6, 1997

SUPREME COURT OF WASHINGTON

DIGITAL EQUIPMENT CORPORATION,
Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Respondent

No. 62414-3

Decided May 23, 1996

SMITH, J.—Digital Equipment Corporation seeks direct review by this court of a Thurston County Superior Court order on summary judgment dismissing Digital's action for refund of or credit for business and occupation (B&0) taxes paid to the State of Washington between January 1, 1983 and August 11, 1987. We granted review. We affirm only the dismissal.

QUESTIONS PRESENTED

The questions presented in this case are: (1) whether United States Supreme Court decisions rendered subsequent to this court's 1988 decision in National Can II[1] have undermined that holding, which denied retroactive application of the Supreme Court's 1987 ruling in Tyler Pipe Industries v. Department of Revenue,[2] a case which struck down as unconstitutional Washington's business and occupation (B&O) tax exemption scheme; and (2) whether the remedy of retroactively applying the

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[1]109 Wn.2d 878, 749 P.2d 1286, cert. denied, 486 U.S. 1040 (1988).

[2]483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987).

1987 B&O tax credit legislation (RCW 82.04.440) meets the requirements of due process under the Fourteenth Amendment.[3]

STATEMENT OF FACTS

In 1984, a group of taxpayers filed suit for refunds of B&O taxes paid to the state of Washington. The taxpayers argued that the state's B&O tax exemption under RCW 82.04.440 violated the Commerce Clause of the United States constitution, article I, section 8, by providing to local manufacturers selling goods in this state a tax exemption not available to manufacturers who sold goods out of state. This court ultimately rejected that argument in the companion cases of Tyler Pipe Industries v. Department of Revenue and National Can Corporation v. Department of Revenue.[4]

In Tyler Pipe Industries v. Department of Revenue, the United States Supreme Court subsequently reversed both Tyler Pipe and National Can, holding that the tax exemption discriminated against interstate commerce in violation of the Commerce Clause.[5] The Court then remanded the case to this court for resolution of "remedial issues."[6] In National Can Corporation v. Department of Revenue (National Can II) we held that the Tyler Pipe decision operated only prospectively and thus

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[3]Digital originally requested an award of attorney fees under 42 U.S.C. §§ 1983 and 1988, but later withdrew the request. See Appellant's Reply Br. at 25.

[4]See Tyler Pipe Indus. v. Department of Rev., 105 Wn.2d 318, 715 P.2d 123 (1986) and National Can Corp. v. Department of Rev., 105 Wn.2d 327, 732 P.2d 134 (1986).

[5]Tyler Pipe Indus. v. Department of Rev., 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987).

[6]Tyler Pipe, 483 U.S. at 253.

no claims could be made for taxes which were paid prior to the decision in that case.[7]

The Washington Legislature responded to the Supreme Court decision in Tyler Pipe by amending the B&O tax exemption statute on August 11, 1987. The amendment replaced the old multiple activities exemption with a two-way credit scheme. The amendment cured the constitutional defect identified by the Court in Tyler Pipe[8] by granting to businesses a credit for gross receipts taxes paid to this or any other state.[9] Although the new credit law expressly stated it was to "take effect immediately,"[10] the Legislature intended that the new law would operate retroactively in the event of a court-ordered remedy.[11] The Legislature also intended that these tax credits would be the exclusive remedy available for those entitled to relief.[12]

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[7]National Can Corp. v. Department of Rev., 109 Wn.2d 878, 895, 749 P.2d 1286, cert. denied, 486 U.S. 1040 (1988).

[8]Although the constitutionality of the 1987 credit law is not at issue in this appeal, we have determined the new law meets constitutional requirements. See American Nat'l Can v. Department of Rev., 114 Wn.2d 236, 248-53, 787 P.2d 545 (holding that the 1987 amendment to the B&O tax credit law satisfies the requirements of the equal protection, due process and commerce clauses), cert. denied, 498 U.S. 880 (1990).

[9]Laws of 1987, 2d Ex. Sess., ch. 3, § 3; RCW 82.04.440.

[10]Laws of 1987, 2d Ex. Sess., ch. 3 § 5.

[11]See id. at § 3; see also American National Can, 114 Wn.2d at 250-53.

[12]Laws of 1987, 2d Ex. Sess., ch. 3, § 3 ("[R]elief [to] be limited to the granting of such credits"); American Nat'l Can, 114 Wn.2d at 253 ("[T]he 1987 credit law limits relief to the granting of credits.").

On August 27, 1987, Digital filed a complaint in the Thurston County Superior Court seeking refund of B&O taxes it paid between January 1, 1983 and July 31, 1987.[13] On December 29, 1988, Digital filed an amended complaint seeking an additional refund of taxes paid from June 23, 1987 through August 11, 1987, the interim period between the Tyler Pipe decision and the effective date of the 1987 legislation (the interim period).[14] The amended complaint also charged that the state's collection efforts of "said illegal taxes" were in violation of 42 U.S.C. § 1983, thus entitling Digital to attorney fees under 42 U.S.C. § 1988.[15]

On April 11, 1994, Digital moved for an order of partial summary judgment to grant its tax refund request for the period January 1, 1983 through August 11, 1987 and an award of attorney fees.[16] The state cross-motioned for summary judgment on April 18, 1994, arguing for outright dismissal of Digital's action.[17] By opinion letter dated September 9, 1994, Judge William Thomas McPhee granted partial summary judgment in favor of the state and dismissed Digital's refund claim as to all tax periods prior to June 23, 1987, but reserved ruling on taxes paid during the interim period pending further oral argument.[18] Digital then filed a motion for reconsideration on October 5, 1994.[19]

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[13]See Clerk's Papers at 4-5.

[14]See id. at 11-12.

[15]See id. at 12 and n.3.

[16]See id. at 41-43.

[17]See id. at 70.

[18]See id. at 174-77.

[19]See id. at 178.

On November 18, 1994, Judge McPhee entered an order denying Digital's motion for reconsideration, granting the state's motion for summary judgment and dismissing Digital's refund claim in its entirety with prejudice.[20] In dismissing Digital's claim, the trial court relied primarily on this court's holding in National Can II that the Tyler Pipe decision was to operate only on a prospective basis.[21]

On December 16, 1994, Digital appealed direct to this court for review.[22] It argues that United States Supreme Court cases decided subsequent to National Can II have undermined this court's holding in that case, and those cases now require that Tyler Pipe be applied retroactively to tax periods predating its determination.[23] Digital also maintains that the 1987 tax credit law, RCW 82.04.440, does not provide it with meaningful redress for taxes it paid under the previous unconstitutional scheme, and hence violates its rights under the Due Process Clause of the Fourteenth Amendment.

DISCUSSION

RETROACTIVITY OF TYLER PIPE

This court was asked in National Can II to decide whether the United States Supreme Court's decision in Tyler Pipe, which declared Washington's B&O tax exemption scheme unconstitutional, must be applied retroactively or applied only prospectively. In deciding the issue, we relied primarily on the retroactivity test outlined by the Supreme Court in Chevron Oil v.

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[20]See id. at 233-37.

[21]See id. at 174-77.

[22]See id. at 238-44.

[23]See, e.g., Br. of Appellant at 3-7.

Huson.[24] In that case, three factors were enumerated for consideration in determining whether an appellate decision applies prospectively or retroactively: (1) whether the decision establishes a new rule of law by overruling clear past precedent or deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether retroactive application would further or retard the purposes of the rule; and (3) whether retroactive application would be inequitable.[25] Employing the Chevron Oil criteria, we concluded that Tyler Pipe applied on a prospective basis only and did not render taxes collected prior to the date of its determination unconstitutional.[26]

However, as later observed by this court in Robinson v. Seattle,[27] the precedential weight to be accorded Chevron Oil has been called into question by recent United States Supreme Court decisions. In James B. Beam Distilling Co. v. Georgia, a taxpayer brought a refund suit against Georgia, claiming a state tax statute which favored alcohol products produced from local goods violated the Commerce Clause.[28] The lower courts agreed the statute was unconstitutional in light of the Supreme Court's decision in Bacchus Imports, Ltd. v. Dias striking down a similar Hawaii

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[24]Chevron Oil v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971).

[25]Chevron Oil, 404 U.S. at 106-07; National Can II, 109 Wn.2d at 881.

[26]See National Can II, 109 Wn.2d at 895.

[27]See Robinson v. City of Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992).

[28]Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, 2442, 115 L. Ed. 2d 481 (1991), cert. denied, 115 S. Ct. 662, 130 L. Ed. 2d 597 (1994).

statute,[29] but concluded the taxpayer was not entitled to a refund.[30] Using the test outlined in Chevron Oil, the Georgia Supreme Court held the Bacchus decision should not apply retroactively to facts antedating its pronouncement.[31]

The United States Supreme Court reversed without considering the Chevron Oil rationale. It held that because the decision in Bacchus applied the rule to the parties then before the Court, that rule should apply to all cases still pending.[32] The Court reasoned that it was error "to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so."[33] Although the Court in Bacchus had not explicitly addressed the question whether its holding should apply retroactively to facts predating its pronouncement, the Court in Beam concluded that retroactivity is assumed when the question of retroactivity is not reserved.[34] Writing for the majority, Justice Souter noted that "[b]ecause the Bacchus opinion did not reserve the question whether its holding should be applied to the parties before it, . . ., it is properly understood to have followed the normal rule of retroactive application in civil cases."[35]

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[29]See Bacchus Imports v. Dias, 468 U.S. 263, 273, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984) (the court struck down Hawaii tax statute favoring locally produced alcoholic beverages as a violation of the Commerce Clause).

[30]Beam, 111 S. Ct. at 2442.

[31]Id.

[32]Id. at 2445.

[33]Id. at 2446.

[34]Id. at 2445.

[35]Id.

In Harper v. Virginia Dep't of Taxation, the Supreme Court was confronted with a Virginia tax statute which exempted from state income taxes only those retirement pensions paid by either state or local governments.[36] The Court had previously decided in Davis v. Michigan Dep't of Treasury that a similar tax imposed by Michigan violated the constitutional doctrine of intergovernmental tax immunity because it treated federal employees differently from state employees.[37] After Davis, Virginia repealed the exemption statute.[38] Taxpayers sued the Virginia Department of Revenue seeking refund of taxes paid under the discriminatory scheme.[39]

The trial court denied the refunds on the basis that the Davis decision did not apply retroactively the Virginia Supreme Court affirmed.[40] Applying the Chevron Oil test, the court held that Davis did not operate retroactively and that pre-Davis tax assessments thus were not improper.[41] Reasoning that because the Court in Davis had not ruled on whether to apply its holding to the litigants in that case, the Virginia court concluded that it remained free to apply the Chevron Oil analysis.[42] The Supreme Court reversed. Reiterating Justice Souter's conclusion in Beam, the Court again noted that once a case announcing a rule of federal law has applied that rule to the litigants before the court, no court

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[36]Harper v. Virginia Dept. of Taxation, ___ U.S. ___, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

[37]Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 817, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989).

[38]Harper, 125 L. Ed. 2d at 82.

[39]Id.

[40]Id.

[41]Id. at 83.

[42]Id.

may "'refuse to apply [that] rule . . . retroactively'."[43] Citing Beam, the Court then articulated the following rule on retroactive application of a previous ruling:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and *must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.*

(Emphasis added.)[44]

The Court then stated that:

> When [it] does not "*reserve the question whether its holding should be applied to the parties before it,*" . . . an opinion announcing a rule of federal law "is properly understood to have followed the *normal rule of retroactive application*" and must be "read to hold . . . that its rule should apply retroactively to the litigants then before [it]." Furthermore, the legal imperative "to apply a rule of federal law retroactively after the case announcing the rule has already done so" must "prevai[l] *over any claim based on a Chevron Oil analysis.*"

(Emphasis added.)[45]

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[43]Id. at 86 (quoting Beam, 111 S. Ct. at 2451.)

[44]Id.

[45]Id. at 86-87 (quoting Beam 111 S. Ct. at 2445.)

Relying on this new "express reservation test," the Court rejected the state court's reasoning that the issue of retroactivity had not been addressed in Davis.[46] It pointed out that in Davis the question of retroactivity had not been reserved by the Court; and since remedial issues had been considered, it had necessarily applied the rule announced in Davis to the litigants before it.[47] That being the case, the Court applied the Davis rule retroactively to the tax years at issue in the Harper taxpayers' refund action.[48] The Court is thus considered to have applied a decision to the parties before it when it has not reserved the question whether its holding should be retroactively applied.[49]

When the Supreme Court remands a case exclusively for resolution of remedial issues, it has not reserved the question of retroactive application of that case.[50] Once it has applied a decision to the litigants in one case, it must do so with respect to all others not barred by res judicata or procedural requirements,[51] regardless of any conclusion derived from application of Chevron Oil principles.[52] The normal rule, then, is retroactive application

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[46]Id. at 87.

[47]Id.

[48]Id. at 88.

[49]Harper, 125 L. Ed. 2d at 86-87; Beam, 111 S. Ct. at 2445; Robinson, 119 Wn.2d at 76.

[50]Harper, 125 L. Ed. 2d at 87; Beam, 111 S. Ct. at 2445.

[51]See Beam, 111 S. Ct. at 2446 ("[R]etroactivity in civil cases must be limited by the need for finality, . . .; once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed.").

[52]Id. at 2447; Robinson, at 75 (quoting Beam).

of a new pronouncement of federal law unless the Court declares otherwise.[53] Chevron Oil no longer controls in this area.[54]

To the extent our decision in National Can II holds that Tyler Pipe applies only on a prospective basis, we overrule it. The rule derived from Beam and Harper is clear: when the United States Supreme Court remands a case, unless it *explicitly* reserves the issue of retroactive application of that case,[55] the normal rule of retroactivity is assumed. In Tyler Pipe, the Court remanded only on the issue of remedies, and did not reserve the question of retroactive application of its holding in the case.[56] Therefore, it follows that the benefit of the Tyler Pipe holding properly might extend to Digital, inasmuch as it would not be barred by either procedural requirements or by res judicata.

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[53]See Beam, 111 S. Ct. at 2443 (noting that the practice of retroactive application is overwhelmingly the norm); Robinson, 119 Wn.2d at 79 (same) (quoting Beam).

[54]See Miller v. Santa Cruz Cy., 39 F.3d 1030, 1035 (9th Cir. 1994) (holding that Harper, not Chevron Oil, is now the controlling rule) cert. denied, 115 S. Ct. 2613, 132 L. Ed. 2d 856 (1995). United States v. 20832 Big Rock Drive, 51 F.3d 1402, 1405-06 (9th Cir. 1995) (same).

[55]The Court in Beam cited American Trucking Ass'n, Inc. v. Scheiner, 483 U.S. 266, 97 L. Ed. 2d 266, 107 S. Ct. 2829 (1987) as an example of reserving the issue of retroactivity to a state court. Beam, 111 S. Ct. at 2445. In American Trucking, the Court remanded a case to the Pennsylvania Supreme Court for consideration of whether the Court's ruling on constitutionality "should be applied retroactively and to decide other remedial issues." American Trucking, 483 U.S. 297-98.

[56]See Tyler Pipe, 483 U.S. at 253; see also American Nat'l Can, 114 Wn.2d at 240.

THE 1987 TAX CREDIT LAW

With retroactive application of the Tyler Pipe decision, Digital conceivably might be entitled to some type of relief. However, as Digital readily concedes, retroactive application of Tyler Pipe does not necessarily entitle it to a refund.[57] Our determination that Digital might be entitled to some form of relief in light of Tyler Pipe brings the 1987 credit law into operation.[58] But Digital argues the 1987 credit law, as an exclusive remedy, does not meet the requirements of federal due process.[59]

A declaration by the United States Supreme Court that a tax scheme is unconstitutional does not, as a matter of federal law, require refund of taxes illegally collected.[60] Rather, "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination."[61] To provide relief consistent with federal due process principles, however, a state may choose to provide a predeprivation remedy, such as "a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing."[62] "On the other hand, if no such predeprivation remedy exists, 'the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief

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[57]See, e.g., Appellant's Reply Br. at 16.

[58]American Nat'l Can, 114 Wn.2d at 251.

[59]See, e.g., Appellant's Br. at 26-33.

[60]Harper, 125 L. Ed. 2d at 88.

[61]Id. at 88-89 (quoting McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 39-40, 110 L. Ed. 2d 17, 110 S. Ct. 2238 (1990)).

[62]Id. at 89 (quoting McKesson, 496 U.S. at 38).

to rectify any unconstitutional deprivation.'"[63] Such relief may take the form of refunds, or "some other order that 'create[s] in hindsight a nondiscriminatory scheme.'"[64]

The issue in this case, then, becomes whether retroactive application of the 1987 credit law, a postdeprivation remedy, satisfies due process as "meaningful backward-looking relief" that "create[s] in hindsight a nondiscriminatory scheme" which will "rectify any unconstitutional deprivation" suffered by Digital. To pass this test, the credit law must treat Digital and those manufacturers who benefited under the prior discriminatory scheme "in a manner consistent with the dictates of the Commerce Clause."[65] It must also provide Digital with both "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property."[66]

Retroactive application of the credit law satisfies the requirements of federal due process. Under the former discriminatory tax scheme, some out-of-state manufacturers paid a wholesaling or retailing B&O tax on Washington sales and also paid manufacturing B&O taxes owed to another state. In-state manufacturers, however, were exempted from the manufacturing tax on any in-state sales subject to the wholesaling or retailing tax. The 1987 credit law remedies this problem by granting a tax credit to any manufacturer paying a gross receipts tax to the state of Washington or any other state. Retroactive application of the law equalizes the tax disparity between benefited and disadvantaged manufacturers by granting tax credits only to the latter. By retroactively granting credits only to manufacturers who suffered

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[63]Id. (quoting McKesson, 496 U.S. at 31).

[64]Id. (quoting McKesson, 496 U.S. at 40).

[65]McKesson, 496 U.S. at 40.

[66]Id.

under the discriminatory law, the state has created "in hindsight a non-discriminatory scheme."[67]

Digital argues that under McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, the Supreme Court outlined the only three options available to states when attempting to provide meaningful backward looking relief: "(1) a full refund of the unconstitutional taxes collected, (2) a retroactive tax on the taxpayers exempted from the tax, or (3) a combination of the two remedies."[68] But nothing in the McKesson opinion suggests the Court intended this enumeration of options to be exclusive. Nor is there any indication that the list of suggested remedies was meant to apply beyond the specific issue confronting the Court in that case: whether the requirements of federal due process were met when Florida provided only prospective relief to taxpayers who had been taxed under an unconstitutional scheme. Digital's interpretation of McKesson also conflicts with the general rule recognized by the Court that the states retain flexibility in crafting a remedy for the unconstitutional collection of taxes.[69]

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[67]Digital argues that "retroactive application of the 1987 credit law will do nothing to change the fact that Digital paid the unconstitutional B&O tax while its competitors did not." Appellant's Reply Br. at 17. Digital also complains that it must apply for credits to equalize the tax disparity between it and manufacturers benefited under the unconstitutional exemption, while no such requirement is placed on the benefited manufacturers. Id. at 17 n.9. But Digital does not explain how either of these two facts leads to the conclusion that retroactive application of the 1987 credit law violates its rights under the Due Process Clause.

[68]Appellant's Br. at 30 (citing McKesson, 496 U.S. at 40-41).

[69]See, e.g., McKesson, 496 U.S. at 39-40 ("a [s]tate found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination"); Associated Indus. v. Lohman, ___ U.S. ___, 114 S. Ct. 1815, 1825, 128 L. Ed. 2d

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The tax credit law, RCW 82.04.440, provides in part:

> **Persons taxable on multiple activities—Credits.** (1) Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.
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> . . . .
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> (4) Persons taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) or RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any (i) gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state, (ii) manufacturing taxes paid with respect to the manufacturing of products using ingredients so extracted in this state, or (iii) manufacturing taxes paid with respect to manufacturing activities completed in another state for products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

Subsection (5) defines "gross receipts tax" to include one which is "not, pursuant to law or custom, separately

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[69](...continued)
639 (1994) (same); Harper, 125 L. Ed. 2d at 89 (noting that in crafting an appropriate remedy, a state is free to choose which form of relief it will provide, so long as it satisfies the minimum federal requirements of due process).

stated from the sales price" and "manufacturing tax" as "a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer. . . ."

Our consideration of the principal issues in this case became acutely academic when counsel for Digital during oral argument conceded that Digital had not been "double taxed" and consequently suffered no injury under the former unconstitutional tax scheme.[70] One of the justices asked "*In your particular situation, did your client actually pay out-of-state gross receipts taxes on its manufacturing operations?*" Counsel for Digital then replied "*We were not actually double taxed.*" This was further reinforced by the April 6, 1994 declaration of R.S. Kuraski, manager of federal and state income tax audits for Digital, in support of Digital's motion for partial summary judgment that:

> *Digital did not pay any qualifying extracting or manufacturing gross receipts taxes to any other jurisdictions outside Washington, including other state or local governments, the District Columbia or foreign countries, on any of the products which were manufactured outside the state of Washington and sold to Washington customers during the time periods [January 1, 1983 through June 23, 1987].*[71]

This is consistent with the assertion of Respondent State in its brief that Digital suffered no injury and is thus entitled to no relief.[72] We also conclude that in this case Digital is entitled to no relief either by tax credits or direct refunds under RCW 82.04.440.

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[70]See RCW 82.04.440(4).

[71]Clerk's Papers at 48 (emphasis added).

[72]See Resp's Br. at 12.

We therefore affirm the Thurston County Superior Court in dismissing on summary judgment Digital's action for refund of or credit for business and occupation (B&O) taxes paid to the State of Washington.

Applying the 1987 credit law to Digital's claim for relief requires consideration of two tax periods. Because the law clearly applies to the interim period of June 23, 1987 and August 11, 1987,[73] Digital conceivably would have been eligible for credits for taxes paid during that period. However, the State correctly asserts that Digital is not entitled to credits for the interim period because it paid no gross receipts taxes, a requirement under the law.[74]

As to the tax period prior to June 23, 1987, the date of the Tyler Pipe decision, Digital conceivably would have been entitled to credits for this period as well. While in American National Can we addressed only the issue of retroactive application of the 1987 credit law to the interim period, section 3 of the 1987 session laws applies the law to tax periods prior to June 23, 1987.[75] In this instance as well, Digital is not entitled to tax credits because it paid no gross receipts taxes.

SUMMARY AND CONCLUSIONS

Once the United States Supreme Court has applied a new pronouncement of federal law to the parties then before the Court, it does so with respect to all others not barred by res judicata or procedural rules. The Court is considered to have applied a decision to the parties before it when it has not explicitly reserved

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[73]See American Nat'l Can, 114 Wn.2d at 240-51 (holding that the 1987 credit law applies to the interim period of June 23, 1987 to August 11, 1987).

[74]See Resp't's Br. at 12.

[75]Laws of 1987, 2d Ex. Sess., ch. 3, § 3; RCW 82.04.440 (historical and statutory notes).

the question whether its holding should be applied retroactively. When the Court remands a case exclusively for resolution of remedial issues, it has not reserved the question of retroactive application of that case.

In the Tyler Pipe decision, in which the Supreme Court declared Washington's B&O tax exemption scheme unconstitutional, the Court did not reserve the question of retroactivity, but instead remanded only for resolution of remedial issues. Tyler Pipe must be applied retroactively to tax periods predating its pronouncement, thus rendering taxes collected under the invalid exemption law unconstitutional. To the extent that our decision in National Can II conflicts with this interpretation of federal retroactivity law, we overrule it.

To provide a postdeprivation remedy for unconstitutionally collected taxes consistent with the principles of federal due process under the Fourteenth Amendment, a remedy must provide meaningful backward-looking relief. It must also create in hindsight a nondiscriminatory scheme which rectifies the unconstitutional deprivation.

Retroactive application of the 1987 credit law, designed to cure the constitutional infirmities of the B&O tax exemption scheme, satisfies the requirements of federal due process as a postdeprivation remedy. By providing manufacturers with tax credits for unconstitutional taxes paid, a clear and certain remedy is provided which cures the unconstitutional deprivation by equalizing the tax disparity between those manufacturers and manufacturers who were not subjected to the unconstitutional B&O taxes.

We affirm the Thurston County Superior Court only in its dismissal on summary judgment of the claim by Appellant Digital Equipment Corporation for refund of or credit under RCW 82.04.440 for business and occupation (B&0) taxes paid to the

state of Washington between January 1, 1983 and August 11, 1987.

/s/ Charles Z. Smith
CHARLES Z. SMITH
Justice

/s/ James M. Dolliver
JAMES M. DOLLIVER
Justice

/s/ Charles W. Johnson
CHARLES W. JOHNSON
Justice

DURHAM, C.J. (concurring)—Digital Equipment Corporation (Digital) seeks a refund of wholesale taxes on products which it manufactured outside Washington but sold in this state before August 11, 1987. Digital contends the Supreme Court's decision in Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), should be applied retroactively, and that only a refund will provide Digital with a remedy which satisfies due process. Although I agree with the majority that Digital is not entitled to any relief, I disagree with the majority's reasoning and with some of the assumptions made by the parties and our prior cases.

Digital contends recent Supreme Court authority calls into question our determination in National Can Corp. v. Department of Revenue, 109 Wn.2d 878, 889, 749 P.2d 1286, cert. denied, 486 U.S. 1040 (1988) (National Can II), that Tyler Pipe would apply only prospectively. I concur in the majority's determination to overrule that holding.[1] However, we should not casually

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[1]Under James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, 2446, 115 L. Ed. 2d 481 (1991), full retroactive application of a new rule of law is the norm, and it is error for a court to refuse to retroactively apply a rule of law after the case announcing the rule has already done so. The majority and the dissent assume that the issue is, therefore, whether the Supreme Court applied Tyler Pipe to the parties before it. The majority finds that Tyler Pipe did not reserve the issue of retroactivity and therefore applies retroactively. The dissent suggests that the Supreme Court left the issue of retroactivity to this court.

The proper formulation of the retroactivity issue here, however, is whether this court, in National Can II, should have retroactively applied Armco Inc. v. Hardesty, 467 U.S. 638, 104 S. Ct. 2620, 81 L. Ed. 2d 540 (1984) (the case which invalidated a similar West Virginia tax scheme). See Tyler Pipe, 483 U.S. at 251-52. Notwithstanding our efforts in National Can Corp. v.

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assume that an out-of-state manufacturer like Digital has a valid discrimination claim under the old multiple activities exemption (MAE) or that the 1987 two-way credit scheme is the appropriate remedy for such discrimination. A review of the history of constitutional challenges to the MAE is necessary to properly evaluate Digital's claims.

The multiple activities exemption before Tyler Pipe:

Washington's business and occupation (B&O) tax system taxes both manufacturing and wholesaling. Since 1950, double tax liability for the same goods was limited by the MAE, which provided an exemption from the manufacturing tax for products which were also subject to the Washington wholesale tax. RCW 82.04.440 (1981). The effect of the MAE was such that only products which were sold outside of Washington were subject to the Washington manufacturing tax. Until the mid-1980's, this system was repeatedly but unsuccessfully challenged on the theory that it discriminated against interstate commerce. Tyler Pipe, 483 U.S. at 237 (citing General Motors Corp. v. Washington, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430 (1964)).

In 1984, the Supreme Court invalidated a West Virginia tax scheme which was similar to Washington's B&O tax. Armco Inc. v. Hardesty, 467 U.S. 638, 104 S. Ct. 2620, 81 L. Ed. 2d 540 (1984). West Virginia imposed a 0.27 percent wholesale tax

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[1](...continued)
Department of Revenue, 105 Wn. 2d 327, 732 P.2d 134 (1986) (National Can I) to distinguish Armco, that case in fact required the partial invalidation of the Washington business and occupation (B&O) tax scheme. The relevant rule of law was Armco, not Tyler Pipe.

Armco did not reserve the issue of retroactivity and can, therefore, be understood to apply retroactively. Because the Supreme Court applied Armco retroactively, it was error, under Beam, for this court to not follow suit in National Can II.

on goods sold in the state. Local manufacturers were exempt from the wholesale tax but paid a 0.88 percent tax on goods manufactured in the state. The Supreme Court found that this scheme discriminated against interstate commerce.

> The tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it. Thus, if the property was manufactured in the State, no tax on the sale is imposed. If the property was manufactured out of the State and imported for sale, a tax of 0.27% is imposed on the sale price.

Armco, 467 U.S. at 642. The fact that local manufacturers paid a higher tax rate on the manufacturing tax did not cure the discriminatory application of the wholesale tax. If the state where the goods were made also imposed a manufacturing tax, the out-of-state manufacturers would pay both a manufacturing and a wholesale tax while the local manufacturers would pay only a manufacturing tax. Armco, 467 U.S. at 642-44.

The "internal consistency" test:

Rejecting the suggestion that the out-of-state manufacturers were required to prove a discriminatory impact, the Armco Court extended its application of the "internal consistency" test to claims of discrimination. "[A] tax must have 'what might be called internal consistency -- that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." Armco, 467 U.S. at 644 (citing Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169, 103 S. Ct. 2933, 77 L. Ed. 2d 545 (1983)). The West Virginia tax system was not internally consistent because liability for the wholesale tax was dependent upon where the goods were manufactured.

The 1985 one-way credit scheme:

Following Armco, numerous firms sought relief from Washington B&O taxes that they had already paid on grounds that the MAE discriminated against interstate commerce. In anticipation of the possible invalidation of the MAE under Armco, the 1985 Legislature amended the MAE to provide a credit against the manufacturing tax for wholesale taxes paid to another state. Final Legislative Report, 49th Sess., SSB 3678, at 303-04 (1985). This one-way credit scheme was to apply (1) only if a court found that the existing MAE discriminated against interstate commerce, and (2) only to tax reporting periods for which relief was found to be appropriate. Laws of 1985, ch. 190, § 1; RCW 82.04.440(4) (1985).

The modified MAE created a B&O tax system that satisfies the internal consistency test. That is, if every jurisdiction taxed both wholesale activity and manufacturing but also provided a credit against the manufacturing tax for wholesale taxes paid to any state, then every state would collect a wholesale tax and all manufacturers would be exempt from manufacturing taxes. The resulting tax burden would not depend upon whether the taxed goods were sold locally or across state lines. Consequently, the MAE, as modified by the 1985 one-way credit scheme, does not discriminate against interstate commerce.

Tyler Pipe:

Following Armco, numerous taxpayers demanded relief from their B&O tax liability. We initially rejected the argument that the MAE was discriminatory. National Can Corp. v. Department of Revenue, 105 Wn.2d 327, 732 P.2d 134 (1986) (National Can I). Taxpayers appealed. The Supreme Court held that the MAE, as it existed before the 1985 amendments, was invalid "because it places a tax burden upon manufacturers in Washington engaged in interstate commerce from which local manufacturers selling locally are exempt." Tyler Pipe, 483 U.S. at 253. Tyler Pipe left this court to decide the necessary remedial issues on remand. Id.

Consistent with its limited holding, Tyler Pipe did not analyze the 1985 one-way credit scheme remedy. The opinion nevertheless indicates that the 1985 Legislature's understanding of the necessary remedy was correct. In defense of the existing MAE, the State argued that the manufacturing tax was similar to a use tax which the Supreme Court had previously upheld. The use tax exempted goods on which sales tax had already been paid in any state, not just in Washington. Tyler Pipe, 483 U.S. at 245 (citing Henneford v. Silas Mason Co., 300 U.S. 577, 57 S. Ct. 524, 81 L. Ed. 814 (1937)). Observing the significant distinction between the use tax and the Washington manufacturing tax, the Supreme Court rejected the State's argument.

> The parallel condition precedent for a valid multiple activities exemption eliminating exposure to the burden of a multiple tax on manufacturing and wholesaling would provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington.

Tyler Pipe, 483 U.S. at 246 (emphasis added). The credit against Washington manufacturing taxes for wholesale taxes paid to any state created a nondiscriminatory scheme which was constitutional under Silas Mason Co. This part of the Tyler Pipe opinion confirms the determination that the 1985 one-way credit scheme cured the discriminatory effect of the old MAE.

Remedies under Tyler Pipe:

Although the Supreme Court limited its holding to a determination that the old MAE discriminated against Washington manufacturers who sold their products outside the state, and expressly reserved all remedial issues for consideration by this court on remand, the Tyler Pipe opinion nevertheless speculated about possible remedies.

> Compliance with our holding on the discrimination issue, however, would not necessarily preclude the

> continued assessment of a wholesaling tax. Either a repeal of the manufacturing tax or an expansion of the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other States would presumably cure the discrimination.

Tyler Pipe, 483 U.S. at 248-49 (emphasis added). It is difficult to discern what the Court meant by this comment. The suggestion that a credit for out-of-state manufacturing taxes is needed to cure the MAE flatly contradicts the passage quoted earlier which indicates that only a credit for out-of-state wholesale taxes is required.

Tyler Pipe never actually explained how the Washington wholesale tax discriminates against interstate commerce. Since 1950, the wholesale tax has been uniformly applied to both in-state and out-of-state manufacturers. That tax was levied on Washington sales without regard to where the goods were manufactured and therefore did not discriminate against interstate commerce. We had previously held that out-of-state manufacturers who pay only Washington wholesale taxes cannot complain of the discriminatory effect of the MAE. B.F. Goodrich Co. v. State, 38 Wn.2d 663, 668, 231 P.2d 325, cert. denied, 342 U.S. 876 (1951).[2]

Furthermore, the application of the Supreme Court's suggestion creates a tax scheme which violates the internal consistency test. Under such a system, Washington would tax both wholesaling and manufacturing but would provide (1) a credit against the manufacturing tax for wholesale taxes paid in Washington (the MAE) and (2) a credit against the wholesale tax for "manufacturing taxes paid to other States" (the suggestion above). If every state adopted such a system, locally manufactured goods sold in-state would be subject to only the wholesale tax. In

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[2]Tyler Pipe discussed, but did not overrule, this case. 483 U.S. at 236 n.7, 9.

contrast, goods sold in interstate commerce would be subject to only the manufacturing tax in the state where they were made.

Fortunately, the Supreme Court's reservation of all remedial issues for resolution by this court made this erroneous suggestion dicta. See National Can II, 109 Wn.2d at 889. We have never actually held that out-of-state manufacturers are entitled to relief under Tyler Pipe or that a credit for out-of-state manufacturing taxes is necessary. Our consideration of these issues was quickly overtaken by events.

The 1987 two-way credit scheme:

Less than a month after the Supreme Court's Tyler Pipe decision, the 1987 Legislature further modified the MAE. Based on the unfortunate reference to a credit for out-of-state manufacturers, the Legislature concluded that "[l]anguage in the [Tyler Pipe] decision suggests the one-way credit may not be a sufficient remedy." Final Legislative Report, 50th Sess., SB 6078, at 115 (1987). This language convinced the 1987 Legislature that it was required to further amend the MAE. See American Nat'l Can Corp. v. Department of Revenue, 114 Wn.2d 236, 787 P.2d 545, cert. denied, 498 U.S. 880 (1990) (National Can III). The Legislature quickly passed new amendments to the MAE which provided a credit against wholesale taxes for manufacturing taxes paid to any state.[3] Laws of 1987, 2d Ex. Sess., ch. 3, § 2; RCW 82.04.440(2) (1987).

This two-way credit scheme applies prospectively from the effective date of the amendment, August 11, 1987. Like the 1985 one-way credit scheme, it applies retroactively only to the extent that a court has determined that a taxpayer is entitled to relief from the existing MAE. Laws of 1987, 2d Ex. Sess., ch. 3, § 3; RCW

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[3]Tyler Pipe suggested a credit for out-of-state manufacturing taxes. 483 U.S. at 249. The two-way credit scheme appears to provide a credit for all manufacturing taxes, including those paid in Washington. RCW 82.04.440(2), (5)(c) (1987).

82.04.440 (1987). On remand from Tyler Pipe, we did not consider the effect of either the 1985 or 1987 amendments to the MAE because we held that Tyler Pipe only applied prospectively. National Can II, 109 Wn.2d at 749.[4]

The present case:

Tyler Pipe held that the MAE discriminated against Washington manufacturers who sold their products outside the state. 483 U.S. at 253. Our determination in B.F. Goodrich Co. that out-of-state manufacturers cannot complain of the discriminatory effect of the MAE has not been reversed.[5] Nevertheless, Digital asserts that it is entitled to a refund for the wholesale taxes it has already paid. We can easily dispose of that claim on its merits.[6]

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[4]The new B&O tax system was challenged again in American Nat'l Can Corp. v. Department of Revenue, 114 Wn.2d 236, 787 P.2d 545 (1990), cert. denied, 498 U.S. 880 (1990) (National Can III). In that case, we upheld the prospective application of the 1987 two-way credit scheme against new discrimination claims. We reversed the trial court's determination that taxpayers were entitled to a refund for B&O taxes paid during the "interim period" between the decision in Tyler Pipe (June 23, 1987) and the effective date of the 1987 amendments (August 11, 1987). Both holdings were based on the parties' concessions and assumptions that the 1987 two-way credit scheme remedied the discrimination identified in Tyler Pipe. National Can III, 114 Wn.2d at 242, 244, 249, 250. We also accepted the State's concession that taxpayers were entitled to the two-way credit remedy during the interim period. National Can III, 114 Wn.2d at 249.

[5]See n.2 infra.

[6]The majority suggests that this case became academic after it was determined that Digital had not been double taxed, i.e., paid any out-of-state manufacturing taxes in addition to its Washington wholesale taxes on the same goods. Majority at 18-19. This

(continued...)

Assuming, arguendo, that Digital has a valid discrimination

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[6](...continued)
observation implies that such double taxation is a necessary or sufficient element of a discrimination claim. Neither is the case.

The application of two states' differing tax schemes may expose interstate commerce to double taxation without discriminating against such commerce.

> It is true, as the State of Washington appearing as amicus curiae points out, that Armco would be faced with the same situation that it complains of here if Ohio (or some other State) imposed a tax only upon manufacturing, while West Virginia imposed a tax only upon wholesaling. In that situation, Armco would bear two taxes, while West Virginia sellers would bear only one. But such a result would not arise from impermissible discrimination against interstate commerce but from fair encouragement of in-state business.

Armco Inc., 467 U.S. at 645.

Conversely, a tax scheme which does not result in double tax liability may be discriminatory. Relief from the West Virginia wholesale tax did not require the out-of-state manufacturers to establish that they actually paid any out-of-state manufacturing taxes. Armco Inc., 467 U.S. at 644. Likewise, Washington manufacturers who sell their products outside this state need not show that they actually paid any out-of-state wholesale taxes. The remedy in such cases may be limited to an expansion of the tax exemption to provide a credit for similar out-of-state taxes (which may not benefit taxpayers who were not double taxed). But until some remedy is provided and the tax scheme is rendered non-discriminatory as applied, the absence of double taxation does not establish that a taxpayer has not suffered discrimination.

claim, the first issue is whether retroactive application of Tyler Pipe in turn triggers the retroactive application of the 1987 two-way credit scheme. The unfortunate dicta in Tyler Pipe has given rise to an almost universal assumption that the 1987 two-way credit scheme is necessary to cure the discrimination created by the old MAE.[7] A careful analysis reveals that this assumption is incorrect.

By its own terms, the 1987 scheme applies retroactively only if the MAE "as it existed before August 11, 1987" is invalidated by a court. Laws of 1987, 2d Ex. Sess., ch. 3, § 3; RCW 82.04.440 (1987). The MAE "as it existed before August 11, 1987" includes the potential retroactive application of the one-way credit scheme created by the 1985 amendments to RCW 82.04.440. As noted earlier, Tyler Pipe invalidated the oldest version of the MAE, not the version of the MAE which included the 1985 one-way credit scheme. See Tyler Pipe, 483 U.S. at 237 n.8.

The retroactive application of Tyler Pipe's invalidation of the pre-1985 MAE triggers the retroactive application of the 1985 one-way credit scheme. RCW 82.04.440(4)(a) (1985). The question then becomes whether that version of the MAE is constitutional. As the 1985 Legislature anticipated, that version of the MAE does not discriminate against interstate commerce. Tyler Pipe does not hold otherwise. In the absence of any final court decision holding that the 1985 one-way credit scheme is discriminatory, the retroactive application of the 1987 scheme is not triggered. Consequently, the 1985 one-way credit scheme applies retroactively to all tax periods before August 11, 1987.[8]

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[7]Relying on National Can III, the majority assumes that the retroactive invalidation of the MAE brings the 1987 two-way credit scheme into operation. Majority at 14.

[8]The assumption in National Can III that the 1987 scheme applies to the interim period appears to be incorrect. However,

(continued...)

Due Process:

The determination that the MAE, as amended by the 1985 one-way credit scheme, does not discriminate against interstate commerce is not the end of the inquiry. Digital was still taxed under the old version of the B&O tax system. Therefore, we must determine whether the retroactive application of the 1985 one-way credit scheme is a constitutionally adequate remedy as applied to Digital. Although Digital challenges the 1987 scheme, the issue is actually whether the 1985 one-way credit scheme satisfies due process.

Due process requires that a state provide a "clear and certain remedy" from the burden of unconstitutional taxes. McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Business Regulation, 496 U.S. 18, 39, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990) (citing Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U.S. 280, 32 S. Ct. 216, 56 L. Ed. 436 (1912)). Where a tax is unconstitutional in its entirety, such as where the tax is beyond the state's power to impose, a state may have no alternative but to refund the unlawfully collected taxes. However, where a tax is unconstitutional only to the extent that it discriminates against interstate commerce, the state enjoys flexibility in curing the defect. McKesson, 496 U.S. at 39-40.

> [T]he State's duty under the Due Process Clause to provide a 'clear and certain remedy' requires it to ensure that the tax as actually imposed on petitioner and its competitors during the contested tax period does not deprive petitioner of tax moneys in a manner that discriminates against interstate commerce.

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[8](...continued)
that assumption was based on the State's concession that it applied. See n.4 infra. The State makes the same concession here. Br. of Resp't at 10.

McKesson, 496 U.S. at 43.

The retroactive application of the 1985 one-way tax credit scheme creates a non-discriminatory B&O tax scheme. The wholesale tax credit against manufacturing taxes is available without regard to whether the goods are sold locally or out of state. The wholesale tax is levied on all goods sold in Washington without regard to where they were manufactured. Although some Washington manufacturers may be entitled to relief under the one-way credit scheme, the wholesale taxes actually imposed on out-of-state manufacturers, like Digital, are nondiscriminatory as applied. As a result, Digital is not entitled to any relief from those taxes.

Conclusion:

I would hold that (1) Tyler Pipe applies retroactively, (2) the 1985 one-way credit scheme applies to all tax periods before August 11, 1987, and (3) this remedy satisfies due process. I would disapprove the incorrect assumptions made in National Can II and National Can III to the extent that they are inconsistent with this analysis.

/s/ Barbara Durham
BARBARA DURHAM
Chief Justice

/s/ Gerry L. Alexander
GERRY L. ALEXANDER
Justice

GUY, J. (dissenting)—I dissent on the retroactivity issue. The line of federal cases announcing the new rule of law on retroactivity does not apply to reopen Tyler Pipe Indus., Inc. v. Department of Revenue, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), for two reasons. First, a new rule of federal law does not apply to cases that are already closed when the rule is announced. Second, the nature of the remand from the Supreme Court in Tyler Pipe does not give rise to application of the new rule of automatic retroactivity announced in James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991).

The majority opinion effectively reopens a case which was final and closed almost a decade ago. The issue of the retroactivity of the Tyler Pipe decision was decided by this court in National Can Corp. v. Department of Revenue, 109 Wn.2d 878, 749 P.2d 1286, cert. denied, 486 U.S. 1040 (1988), under the then existing law. The parties to that case sought review in the United States Supreme Court and that review was denied. The law is settled on the issue; the decision of Tyler Pipe is given prospective only application. If the United States Supreme Court were deciding the Tyler Pipe case today, it probably would apply its new rule of commerce clause law to the litigants before it and thereby mandate retroactive effect be given its decision. If this court were deciding National Can today and if the Supreme Court had applied the new rule to the litigants, we would give the new rule of law retroactive effect. However, those cases are not being decided today; they were final eight years ago. Tyler Pipe and the remand to this court, National Can, were decided in 1987 and 1988, respectively, and the law in effect at that time was applied by the Supreme Court and by this court and that case is closed. The majority opinion reopens that case, which is in direct conflict with law announced by the Supreme Court.

The new rule on retroactivity announced in Beam Distilling in 1991 does not apply to the present case because the present litigants are asking us to reach back in time and apply a new rule of federal law to a case which was decided before the new rule of law was announced. The Supreme Court has clearly explained that

new legal principles, even when applied retroactively, do not apply to cases already closed. Reynoldsville Casket Co. v. Hyde, ___ U.S. ___, 115 S. Ct. 1745, 1751, 131 L. Ed. 2d 820 (1995).[1] The Tyler Pipe case has been closed since 1988 when the Supreme Court denied review of our decision in National Can. Therefore, the new federal rule on retroactivity announced in 1991 in Beam Distilling does not apply to the National Can decision.

It is illogical that the Supreme Court would remand to this court to allow us to decide how to apply its holding, deny certiorari on our decision applying the decision prospectively, and now mandate the case be applied in a contrary fashion to parties not even before the court in that controversy. I think the majority misreads the decision in Tyler Pipe when it finds the Supreme Court in that case did not leave open the issue of retroactivity, and it ignores the rule that new legal principles do not apply to cases already closed. A history of the cases and facts involved shows that the Supreme Court did allow this court to make the retroactivity decision after its holding in Tyler Pipe, and that its newer rules of retroactivity do not apply under the facts of this case.

In 1987, the United States Supreme Court declared unconstitutional a part of Washington state's B&O tax law and remanded to this court to decide if the decision should be applied retroactively or prospectively. The Supreme Court cited us to Chevron Oil,[2] indicating that it contained the "factors to consider in deciding whether to impose [the] decision prospectively only."[3]

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[1]See also Beam Distilling, 501 U.S. at 541 (retroactivity in civil cases must be limited by the need for finality and a new rule "cannot reopen the door already closed.")

[2]Chevron Oil v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971).

[3]The Supreme Court in Tyler Pipe stated as follows:

(continued...)

Tyler Pipe, 483 U.S. at 251-53. We applied the Chevron Oil factors and held that the decision invalidating the state tax should be applied prospectively only. The Supreme Court denied review of that decision. National Can Corp. v. Department of Revenue,

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[3](...continued)

> The [Washington] Department of Revenue argues that any adverse decision in these cases should not be applied retroactively because the taxes at issue were assessed prior to our opinion in Armco and the holding in that case was not clearly foreshadowed by earlier opinions. See Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971) (factors to consider in deciding whether to impose decision prospectively only). The State's argument is similar to an argument advanced by the State of Hawaii in Bacchus Imports, Ltd. v. Dias, 468 U.S., at 276-277. The State urged that, if we invalidated the tax at issue, we should not require the payment of refunds to taxpayers. We did not resolve the merits of that issue, *concluding that this Court should not take it upon itself in this complex area of state tax structures to determine how to apply its holding*[.]

Tyler Pipe, 483 U.S. at 251-52 (emphasis added)

The Court concluded that "it is likewise appropriate for the Supreme Court of Washington to address in the first instance the refund issues raised by our rulings in these cases." Tyler Pipe, 483 U.S. at 253.

We understood that on remand this court was to decide the issue of retroactivity. National Can, 109 Wn.2d at 881. We decided refunds were not available to the parties before the court for taxes collected before the date of the Supreme Court's decision because the case should be given pure prospective application. National Can, 109 Wn.2d at 895.

109 Wn.2d 878, 749 P.2d 1286, appeal dismissed and cert. denied, 486 U.S. 1040 (1988). As a result, the litigant taxpayers in the Tyler Pipe case did not receive the benefit of the new rule with regard to taxes paid before the date of the Tyler Pipe decision. National Can, 109 Wn.2d at 895. In other words, the case was not given retroactive effect as to the litigant taxpayers or any other similarly situated taxpayers.

In Beam Distilling, the Supreme Court announced a new rule of law and retreated from its former Chevron Oil rule, holding that it is error to refuse to apply a rule of federal law retroactively *after the case announcing the rule has already done so*. It is important to recognize that the Beam Distilling Court held only that *when it applied a new rule to the parties then before the Court*, that rule should then be applied to all others not barred by res judicata or procedural requirements. Beam Distilling, 501 U.S. at 544.[4] Similarly, in Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 113 S. Ct. 2510, 2513, 125 L. Ed. 2d 74 (1993), the Court reiterated that the "Court's application of a rule of federal law to the parties before [it] requires every court to give retroactive effect to that decision." The Court held that a rule of federal law, once announced *and applied to the parties to the controversy*, must be given full retroactive effect by all courts adjudicating federal law. Harper, 113 S. Ct. at 2517; see also Reynoldsville Casket, 115 S. Ct. at 1748.

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[4]The Supreme Court stated:

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.

Beam Distilling, 501 U.S. at 544 (Souter, J.).

The point is that in Tyler Pipe (the case announcing the new rule at issue here) the Supreme Court *did not apply the rule to the litigants before it*. It left open the issue of retroactivity for this court to decide. It did not, as the majority suggests, simply remand for a remedy; it also remanded for the determination of retroactivity. We decided that question under the then applicable law. The Supreme Court declined review and the case was closed. Nothing in Beam Distilling or Harper changes our decision. In the Beam Distilling and Harper decisions, the Court concluded that when it did not reserve the question whether its holding should be applied to the parties before it, the normal rule of retroactive application will be followed. Beam Distilling, 501 U.S. at 539; Harper, 113 S. Ct. at 2518. However, in Tyler Pipe the issue was reserved. The Supreme Court did not apply the rule to the parties before it; rather, it remanded to this court for the determination of retroactivity. It did not therefore mandate retroactive effect be given to that decision which decided a new rule of constitutional law. See National Can, 109 Wn.2d at 882-88.

The majority opinion results in a strange and unfair result. The parties that bore the cost and burden of litigating the constitutionality of the tax in the Tyler Pipe case did not receive tax refunds because the new rule (invalidating the tax) was only applied prospectively. However, the majority would now give retroactive application of this very same decision to taxpayers who were not involved in that litigation. This results in the very unfairness that the Supreme Court decried in Beam Distilling;[5]

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[5]We understood this issue in Robinson v. City of Seattle, 119 Wn.2d 34, 77, 830 P.2d 318 (1992). We explained that

> under Beam Distilling, *retroactive application of a principle in a case announcing a new rule precludes prospective application of the rule in any subsequently raised suit based upon the new rule*. Such selective, or "modified", prospectivity would be unequal and unmindful of stare decisis as it treats similarly situated litigants unequally.

that is, that the new rule applied to the litigants but not to others similarly situated. Here the majority decision results in an even greater injustice because those that successfully litigated the issue in Tyler Pipe were denied the retroactive application of the new rule to past events while those unrelated to the case now receive retroactive application of the new rule to taxes they paid before the date the tax was declared unconstitutional. In Beam Distilling, the Court explained that principles of equality and stare decisis dictate that "similarly situated litigants should be treated the same," and therefore a new rule cannot be applied retroactively to some litigants when it is not applied retroactively to others. Beam Distilling, 501 U.S. at 540, 542-43 (Souter, J.).

I would hold that the Tyler Pipe decision has always had, and still does have, only prospective application. Because the Supreme Court did not apply the new rule of law to the litigants before it in that case, no law requires it be given retroactive effect as to others who were not before the Court. Additionally, I would apply the federal law which holds that new rules of federal law do not apply to cases which are otherwise final. Any other rule could play havoc with cases wherein new rules of law were applied only to cases not yet final.

I would affirm the trial court.

/s/ Richard P. Guy
RICHARD P. GUY
Justice

I agree

/s/ Barbara A. Madsen
BARBARA A. MADSEN
Justice

/s/ Rosselle Pekelis
ROSSELLE PEKELIS
Justice Pro Tem

I concur

/s/ Philip A. Talmadge
PHILIP A. TALMADGE
Justice

SUPREME COURT OF WASHINGTON

DIGITAL EQUIPMENT CORPORATION,
Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Respondent

No. 62414-3

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having considered the Appellant's Motion for Reconsideration of Decision Terminating Review and the Respondent's Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That Appellant's Motion for Reconsideration of Decision Terminating Review and the Respondent's Motion for Reconsideration are both denied.

DATED at Olympia, Washington this 8th day of November, 1996.

/s/ James M. Dolliver
James M. Dolliver
for CHIEF JUSTICE

Superior Court of the State of Washington
For Thurston County

September 9, 1994

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Re *Digital Equipment Corporation v. State of Washington, Department of Revenue*
Thurston County Cause No. 87-2-01627-4

Opinion Letter

Dear Counsel:

This matter comes before the court on cross-motions for summary judgment. Plaintiff's motion is for partial summary judgment; defendant's motion is for dismissal. Even where opposing parties present cross-motions on a seemingly agreed set of facts, the court must first determine whether there are material issues of fact which must be resolved before addressing legal issues. I have done that in this case, applying the standard of judging the evidence in the light most favorable to first one party and then the other. Having done so, I conclude that as to the issues decided here there are no material issues of fact.

In deciding legal issues on summary judgment the first task of the court is to determine the appropriate standard for judging the legal issues before it. This is usually an obvious and unstated determination -- a trial court is bound to follow the rule of law announced by our courts of appeal in this state. That is the standard urged upon me by the department in this case. Among the arguments advanced by the department is the contention that this court is bound to follow the precedent established in National Can v. Department of Rev., 108 Wn.2d 878, 749 P.2d 1286 (1988) (National Can II). However, where federal law is directly in point and in conflict with state law, it is supreme. If directly in point and in conflict, the supremacy clause of the U.S. Constitution would require that this court consider and apply the rules of law announced by the U.S. Supreme Court in James B. Beam Distilling Co. v. Georgia, 501 U.S. ___, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991); and Harper v. Virginia Dept. of Taxation, 509 U.S. ___, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993). Digital argues that these two cases overturn National Can II, and among the arguments it makes, it contends that I should apply those decisions by virtue of the supremacy clause. I conclude that while both of those principles guide this court, the facts and legal issues of this case are such that a careful analysis of the issues should precede my decision. Without that analysis this court cannot simply apply National Can II on the basis of stare decisis, or Beam and Harper on the basis of the supremacy clause.

There are several important time frames in this case. The first of those, and the most important is the time frame from January 1, 1983 through June 23, 1987. It was during this period that most of the tax payments were made.

I conclude that the department is entitled to summary judgment dismissing the claim for tax payments made by Digital between January 1, 1993 [sic] and June 23, 1987. This summary judgment rests upon the authority of Tyler Pipe Indus., Inc. v. Department of Rev., 483 U.S. 232, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987); and (National Can II).

The central issue in this determination is the impact of Beam and Harper upon National Can II. I conclude that the rule of law announced in Tyler was given purely prospective application by National Can II. The United States Supreme Court denied review of that determination, letting the decision stand. The subsequent cases decided by the United States Supreme Court, Beam and Harper, address selective prospectivity. The principle announced in Beam and Harper, distilled to its essence, is that a choice of law rule which treats similarly situated litigants differently is unconstitutional. The result announced here is not inconsistent with that principle. In fact, an opposite result would wreck havoc with the principle; it would result in opposite treatment for two similarly situated litigants (National Can and Digital), with the original litigant, National Can, getting the decidedly short end of this legal stick.

It is evident that Beam and Harper prohibit selective prospectivity. It is equally evident that the test of Chevron Oil Company v. Huson, 404 U.S. 97, 30 L. Ed. 2d 200, 104 S. Ct. 1049 (1971), remains valid for the rare case of pure prospectivity. Whether Tyler is a pure prospectivity case is the hard issue before this court. There is language in various U.S. Supreme Court decisions that support either side of that question. In the end, it is the principle announced in Beam and Harper that leads this court to conclude that Tyler was and will continue to be a case of pure prospectivity.

In Tyler, the Supreme Court declared:

> "Our partial invalidation of the State's taxing scheme raises remedial issues that are better addressed by the State Supreme Court on remand. Accordingly, we vacate the judgments of the Supreme Court of Washington and remand for further proceedings not inconsistent with this opinion."

97 L. Ed. 2d at 217. The act of remanding a tax case back to a state court is by no means a determination of the U.S. Supreme

Court that the case is to be applied in a purely prospective manner. Consider the court's declaration in Harper v. Virginia Department of Taxation, 125 L. Ed. 2d 74, 87 (1993):

> "In an effort to distinguish Davis, the Supreme Court of Virginia surmised that this Court had 'made no . . . ruling' about the application of the rule announced in Davis 'retroactively to the litigants in that case.' 242 Va., at 326, 410 SE2d, at 631. '[B]ecause the retroactivity issue was not decided in Davis,' the court believed that it was 'not foreclosed by precedent from applying the three-pronged Chevron Oil test in deciding the retroactivity issue is the present case.' Ibid.
>
> "We disagree. Davis did not hold that preferential state tax treatment of state and local employee pensions, though constitutionally invalid in the future, should be upheld as to all events predating the announcement of Davis. The governmental appellee in Davis 'conceded that a refund [would have been] appropriate' if we were to conclude that 'the Michigan Income Tax Act violate[d] principles of intergovernmental tax immunity by favoring retired state and local governmental employees over retired federal employees.' 489 US, at 817, 103 L. Ed. 2d 891, 109 S. Ct. 1500. We stated that 'to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund.' Ibid. Far from reserving the retroactivity question, our response to the appellee's concession constituted a retroactive application of the rule announced in Davis to the parties before the Court. Because a decision to accord solely prospective effect to Davis would have foreclosed any discussion of remedial issues, our 'consideration of remedial issues' meant 'necessarily' that we retroactively applied the rule we announced in Davis to the litigants before us.

> Beam, supra, at --, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (opinion of Souter, J.). Therefore, under Griffith, Beam, and the retroactivity approach we adopt today, the Supreme Court of Virginia must apply Davis in petitioners' refund action."

The above passage is important for two reasons. First, by implication the Supreme Court validated the three-pronged Chevron Oil test for purely prospective choice of law questions. If the Chevron Oil Test was no longer valid, the Supreme Court would have rejected out-of-hand the approach taken by the Supreme Court of Virginia. Instead, it distinguished the Davis decision discussed therein from a case of pure prospectivity. The distinction would be important only if the Chevron Oil Test still applied to pure prospectivity. The above passage is important for a second reason in that it clearly separates remand for "consideration of remedial issues" from pure prospectivity. Remand of a tax case does not necessarily mean that the U.S. Supreme Court intends to leave the decision of pure prospectivity to a state court.

If Harper was the only evidence of the U.S. Supreme Court's intention in Tyler, one would conclude that Tyler was not a pure prospectivity case. However, Harper is not the only evidence. In American Trucking Assoc., Inc. v. Scheiner, 483 US 266, 297-298, 97 L. Ed. 2d 226, 107 S. Ct. 2829 (1987). The Supreme Court remanded a case back to the Supreme Court of Pennsylvania to consider whether the U.S. Supreme Court ruling on constitutionality, "should be applied retroactively and to decide other remedial issues." This case and language is cited by the Supreme Court in Beam (115 L. Ed. 2d at 490) as an example of reserving the issue of retroactivity to a state court. Significantly, in the Scheiner decision the Supreme Court cited Tyler as precedent for its remand. If Scheiner reserved the issue of pure prospectivity to the State Supreme Court, one may reasonably infer that the case cited as precedent, Tyler, is also considered a pure prospectivity case.

Beyond the implication of the Scheiner case, there is more direct evidence found in the language of National Can II. In introducing the discussion of the court's decision, Justice Utter wrote:

> "The decisive issues before this court are whether state law mandates refunds, and if not, whether this is an appropriate case for prospective application. We hold state law does not require refunds, and prospective application is appropriate."

109 Wn.2d at 880.

The U.S. Supreme Court denied review of this decision and let it stand. The denial of review is not binding precedent. It means only that the reviewing court affirms the outcome. However, the outcome in National Can II cannot be affirmed without accepting the ruling approving prospective application. If the U.S. Supreme Court intends that Tyler is to have retroactive application for Digital, it would then be accepting the very principle rejected in both Beam and Harper, that being that similarly situated litigants should not be treated differently.

For the above reasons the department is awarded summary judgment dismissing the claim for tax payments made by Digital between January 1, 1983 and June 23, 1987. The court reserves ruling on the other periods of time pending further argument.

Very truly yours,

/s/ Wm. Thomas McPhee
Wm. Thomas McPhee, Judge

IN THE SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

DIGITAL EQUIPMENT CORPORATION, Plaintiff, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, Defendant.	No. 87-2-01627-4 ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

THIS MATTER originally came before the Court on June 20, 1994, for hearing on Plaintiff's Motion for Partial Summary Judgment and on Defendant's Cross-Motion for Summary Judgment. On September 9, 1994, the Court issued a letter opinion concluding that Defendant is entitled to a summary judgment dismissing Plaintiff's refund claims relating to periods from January 1, 1983 to June 23, 1987, and reserving ruling on the parties' cross-motions for summary judgment for Plaintiff's remaining refund claims relating to periods June 23, 1987 to August 11, 1987 pending further oral argument. Plaintiff has abandoned any refund claims stated in its Amended Complaint for Refund of Taxes for periods after August 11, 1987.

On October 5, 1994, Plaintiff filed a Motion for Reconsideration and Supporting Memorandum, asking the Court to reconsider its letter opinion dated September 9, 1994. On October 24, 1994, the Court heard further oral argument concerning the matters reserved in that letter opinion and concerning the matters addressed in Plaintiff's motion for reconsideration. Thus, the parties' original cross-motions for summary judgment and Plaintiff's motion for reconsideration were

before the Court for hearing on October 24, 1994, and the Court heard argument concerning all of Plaintiff's refund claims, both those relating to periods from January 1, 1983 to June 23, 1987, and those relating to periods from June 23, 1987 to August 11, 1987.

On November 7, 1994, the Court issued a letter opinion concluding that Plaintiff's motion for reconsideration should be denied and that Defendant is entitled to a summary judgment concerning the matters reserved in the Court's previous letter opinion.

The Court considered the following materials in ruling on the parties' cross-motions for summary judgment:

1. Amended Complaint for Refund of Taxes, dated December 29, 1988;

2. Plaintiff Digital Equipment Corporation's Motion for Partial Summary Judgment, dated April 11, 1994;

3. Memorandum in Support of Plaintiff Digital Equipment Corporation's Motion for Partial Summary Judgment, dated April 11, 1994;

4. Declaration of R.S. Kuraska in Support of Motion for Partial Summary Judgment, dated April 6, 1994;

5. Affidavit of George C. Mastrodonato with Exhibits to Plaintiff's Memorandum in Support of Partial Summary Judgment, dated April 11, 1994;

6. Defendant's Cross-Motion for Summary Judgment, dated April 18, 1994;

7. Memorandum in Support of Cross-Motion for Summary Judgment, dated April 18, 1994;

8. Digital Equipment Corporation's Response to Department of Revenue Memorandum in Support of Cross-Motion for Summary Judgment, dated May 27, 1994;

9. Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, dated May 27, 1994;

10. Digital's Reply to Department's Memorandum in Opposition to Motion for Partial Summary Judgment, dated June 10, 1994; and

11. Reply Memorandum in Support of Defendant's Cross-Motion for Summary Judgment, dated June 10, 1994.

The Court considered the following materials in ruling on Plaintiff's motion for reconsideration:

1. Motion for Reconsideration and Supporting Memorandum, dated October 5, 1994;

2. Memorandum in Opposition to Plaintiff's Motion for Reconsideration, dated October 14, 1994; and

3. Plaintiff's Reply Memorandum in Support of Motion for Reconsideration, dated October 21, 1994.

The Court, having considered the above-listed materials and the oral arguments presented by the respective counsel, deems itself fully advised in the premises. Now, therefore, for the reasons outlined in the Court's letter opinion dated September 9, 1994, and the Court's letter opinion dated November 7, 1994, the Court hereby:

ORDERS, ADJUDGES AND DECREES that Plaintiff's Motion for Reconsideration is hereby DENIED. The Court further

ORDERS, ADJUDGES AND DECREES that because the materials considered by the Court show there is no genuine issue as to any material fact and as a matter of law Defendant is entitled

to summary judgment as to all Plaintiff's claims in this action, Defendant's Cross-Motion for Summary Judgment is hereby GRANTED, Plaintiff's Motion for Partial Summary Judgment is hereby DENIED, and this action is hereby DISMISSED WITH PREJUDICE. The Court further

ORDERS, ADJUDGES AND DECREES that Defendant shall have its taxable costs.

This Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Reconsideration constitutes a final judgment in this action.

DATED this 18th day of November, 1994.

/s/ Wm. Thomas McPhee
JUDGE WM. THOMAS McPHEE

Presented by:

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

/s/ Donald F. Cofer
DONALD F. COFER
Senior Counsel
WSBA # 10896
Attorneys for Defendant

Approved as to form; notice of
presentation waived; copy received:

LANE POWELL SPEARS LUBERSKY

/s/ George C. Mastrodonato
GEORGE C. MASTRODONATO
WSBA # 7483
Attorneys for Plaintiff

SSB 3678

AN ACT Relating to revenue and excise taxation; amending RCW 82.04.440; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. Section 82.04.440, chapter 15, Laws of 1961 as last amended by section 5, chapter 172, Laws of 1981 and RCW 82.04.440 are each amended to read as follows:

(1) Except as provided in subsections (2) and (3) of this section, every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in((: ~~PROVIDED, that~~)).

(2) (a) Persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240 or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold((; ~~and that~~)).

(b) If (a) of this subsection is held by a state or federal court, in a final judgment unappealed from, to result in discrimination against interstate or foreign commerce, this entire subsection shall be null and void.

(3) Persons taxable under RCW 82.04.240 or ((~~RCW~~)) 82.04.260 subsection (4) shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured.

(4) Every person taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5) or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any gross

receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products. This subsection shall apply to tax reporting periods after July 1, 1985.

(a) For the purpose of this subsection, the term "gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(b) For the purpose of this subsection, the term "state" means state of the United States, any political subdivision thereof, or the District of Columbia, and any foreign country or political subdivision thereof.

NEW SECTION. Sec. 2. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

WASHINGTON LAWS, 1985

CHAPTER 190
[Engrossed Substitute Senate Bill No. 3678]
BUSINESS AND OCCUPATION TAX—CREDIT FOR TAXES PAID TO ANOTHER STATE FOR SALES OF PRODUCTS EXTRACTED OR MANUFACTURED IN-STATE

AN ACT Relating to revenue and taxation; amending RCW 82.04.440, 82.49.010, 82.49.030; adding a new section to chapter 82.12 RCW; adding a new section to chapter 82.49 RCW; creating a new section; repealing RCW 82.49.040, 82.49.050, and 82.49.060; providing an effective date; and declaring and emergency.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 82.04.440, chapter 15, Laws of 1961 as last amended by section 5, chapter 172, Laws of 1981 and RCW 82.04.440 are each amended to read as follows:

(1) Except as provided in subsections (2) and (3) of this section, every person engaged in activities which are within the purview of the provisions of two or more sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in((: ~~PROVIDED, That~~)).

(2) Persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold((; ~~and that~~)).

(3) Persons taxable under RCW 82.04.240 or ((~~RCW~~)) 82.04.260 subsection (4) shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured.

(4)(a) If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that subsection (2) of this section results in an unconstitutional discrimination against interstate or foreign commerce, and that relief is appropriate for any tax reporting periods either before or after the effective date of this 1985 act, it is the intent of the legislature that the credit provided in (b) of this subsection shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credit. It is further the intent of the legislature that such credit shall be applicable only under the conditions and to the extent provided in this subsection (4).

(b) As provided in (a) of this subsection, a person taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(c) For the purpose of this subsection, "gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(d) For the purpose of this subsection, "state" means state of the United States, any political subdivision thereof, or the District of Columbia, and any foreign country or political subdivision thereof.

WASHINGTON LAWS, 1987 2nd Ex. Sess.

CHAPTER 3
[Senate Bill No. 6078]
BUSINESS AND OCCUPATION TAX—
MULTIPLE ACTIVITIES—TAX CREDITS

AN ACT Relating to business and occupation taxation of multiple activities; amending RCW 82.04.440; creating new sections; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. The legislature finds that the invalidation of the multiple activities exemption contained in RCW 82.04.440 by the United States Supreme Court now requires adjustments to the state's business and occupation tax to achieve constitutional equality between Washington taxpayers who have conducted and will continue to conduct business in interstate and intrastate commerce. It is the intent of this act to preserve the integrity of Washington's business and occupation tax system and impose only that financial burden upon the state necessary to establish parity in taxation between such taxpayers.

Thus, this act extends the system of credits originated in RCW 82.04.440 in 1985 to provide for equal treatment of taxpayers engaging in extracting, manufacturing or selling regardless of the location in which any of such activities occurs. It is further intended that RCW 82.04.440, as amended by section 2 of this act, shall be construed and applied in a manner that will eliminate unconstitutional discrimination between taxpayers and ensure the preservation and collection of revenues from the conduct of multiple activities in which taxpayers in this state may engage.

Sec. 2. Section 82.04.440, chapter 15, Laws of 1961 as last amended by section 1, chapter 190, Laws of 1985 and RCW 82.04.440 are each amended to read as follows:

(1) ((~~Except as provided in subsections (2) and (3) of this section,~~)) Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

(2) Persons taxable under RCW 82.04.250 or 82.04.270 shall ((~~not be taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold~~)) be allowed a credit against those taxes for any (a) manufacturing taxes paid with respect to the manufacturing of products so sold in this state, and/or (b) extracting taxes paid with respect to the extracting of products so sold in this state or ingredients of products so sold in this state. Extracting taxes taken as credit under subsection (3) of this section may also be taken under this subsection, if otherwise allowable under this subsection. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the sale of those products.

(3) Persons taxable under RCW 82.04.240 or 82.04.260 subsection (4) ((~~shall not be taxable under RCW 82.04.230~~)) be allowed a credit against those taxes for any extracting taxes paid with respect to extracting the ingredients of the products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the manufacturing of those products.

(4) (((~~(a) If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that subsection (2) of this section results in an unconstitutional discrimination against interstate or foreign commerce, and that relief is appropriate for any tax reporting periods either before or after April 30, 1985, it is the intent of the legislature that the credit provided in (b) of this subsection shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credit. It is further the intent of the legislature that such credit shall be applicable only under the conditions and to the extent provided in this subsection (4):~~

~~(b) As provided in (a) of this subsection,~~)) Persons taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any (i) gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state, (ii) manufacturing taxes paid with respect to the manufacturing of products using ingredients so extracted in this state, or (iii) manufacturing taxes paid with respect to manufacturing activities completed in another state for products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(((~~(c)~~))) (5) For the purpose of this ((~~subsection,~~)) section:

(a) "Gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(((~~(d) For the purpose of this subsection,~~)) (b) "State" means (i) the state of Washington, (ii) a state of the United States other than Washington, or any political subdivision ((~~thereof, or~~)) of such other state, (iii) the District of Columbia, and (iv) any foreign country or political subdivision thereof.

(c) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes (i) the taxes imposed in RCW 82.04.240 and subsections (2), (3), (4), (5), and (7) of RCW 82.04.260, and (ii) similar gross receipts taxes paid to other states.

(d) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes the tax imposed in RCW 82.04.230 and similar gross receipts taxes paid to other states.

(e) "Business", "manufacturer", "extractor", and other terms used in this section have the meanings given in RCW 82.04.020 through 82.04.212, notwithstanding the use of those terms in the context of describing taxes imposed by other states.

NEW SECTION. Sec. 3. If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that relief is appropriate for any tax reporting periods before the effective date of this act, in respect to RCW 82.04.440 as it existed before the effective date of this act, it is the intent of the legislature that the credits provided in RCW 82.04.440 as amended by section 2 of this act shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credits.

NEW SECTION. Sec. 4. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 5. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate August 10, 1987.
Passed the House August 10, 1987.
Approved by the Governor August 11, 1987.
Filed in Office of Secretary of State August 11, 1987.

REVISED CODE OF WASHINGTON (RCW)

82.32.060 Excess payment of tax, penalty, or interest—Credit or refund—Payment of judgments for refund. (1) If, upon receipt of an application by a taxpayer for a refund or for an audit of the taxpayer's records, or upon an examination of the returns or records of any taxpayer, it is determined by the department that within the statutory period for assessment of taxes, penalties, or interest prescribed by RCW 82.32.050 any amount of tax, penalty, or interest has been paid in excess of that properly due, the excess amount paid within, or attributable to, such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at the taxpayer's option. Except as provided in subsections (2) and (3) of this section, no refund or credit shall be made for taxes, penalties, or interest paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

(2) The execution of a written waiver under RCW 82.32.050 or 82.32.100 shall extend the time for making a refund or credit of any taxes paid during, or attributable to, the years covered by the waiver if, prior to the expiration of the waiver period, an application for refund of such taxes is made by the taxpayer or the department discovers a refund or credit is due.

(3) Notwithstanding the foregoing limitations there shall be refunded or credited to taxpayers engaged in the performance of United States government contracts or subcontracts the amount of any tax paid, measured by that portion of the amounts received from the United States, which the taxpayer is required by contract or applicable federal statute to refund or credit to the United States, if claim for such refund is filed by the taxpayer with the department within one year of the date that the amount of the refund or credit due to the United States is finally determined and filed within four years of the date on which the tax was paid: PROVIDED, That no interest shall be allowed on such refund.

(4) Any such refunds shall be made by means of vouchers approved by the department and by the issuance of state warrants drawn upon and payable from such funds as the legislature may provide. However, taxpayers who are required to pay taxes by electronic funds transfer under RCW 82.32.080 shall have any refunds paid by electronic funds transfer.

(5) Any judgment for which a recovery is granted by any court of competent jurisdiction, not appealed from, for tax, penalties, and interest which were paid by the taxpayer, and costs, in a suit by any taxpayer shall be paid in the same manner, as provided in subsection (4) of this section, upon the filing with the department of a certified copy of the order or judgment of the court. Except as to the credits in computing tax authorized by RCW 82.04.435, interest at the rate of three percent per annum shall be allowed by the department and by any court on the amount of any refund, credit, or other recovery allowed to a taxpayer for taxes, penalties, or interest paid by the taxpayer before January 1, 1992. For refunds or credits of amounts paid or other recovery allowed to a taxpayer after December 31, 1991, the rate of interest shall be the rate as computed for assessments under RCW 82.32.050(2), less one percentage point. [1992 c 169 § 2; 1991 c 142 § 10; 1990 c 69 § 1; 1989 c 378 § 20; 1979 ex.s. c 95 § 4; 1971 ex.s. c 299 § 17; 1965 ex.s. c 173 § 27; 1963 c 22 § 1; 1961 c 15 § 82.32.060. Prior: 1951 1st ex.s. c 9 § 6; 1949 c 228 § 21; 1935 c 180 § 189; Rem. Supp. 1949 § 8370-189.]

. . . .

82.32.090 Late payment—Disregard of written instructions—Evasion—Penalties. ***(Effective until January 1, 1997.)*** (1) If payment of any tax due on a return to be filed by a taxpayer is not received by the department of revenue by the due date, there shall be assessed a penalty five percent of the amount of the tax; and if the tax is not received within thirty days after the due date, there shall be assessed a total penalty of ten percent of the amount of the tax; and if the tax is not received within sixty days after the due date, there shall be assessed a total penalty of

twenty percent of the amount of the tax. No penalty so added shall be less than five dollars.

(2) If payment of any tax assessed by the department of revenue is not received by the department by the due date specified in the notice, or any extension thereof, the department shall add a penalty of ten percent of the amount of the additional tax found due. No penalty so added shall be less than five dollars.

(3) If a warrant be issued by the department of revenue for the collection of taxes, increases, and penalties, there shall be added thereto a penalty of five percent of the amount of the tax, but not less than ten dollars.

(4) If the department finds that all or any part of a deficiency resulted from the disregard of specific written instructions as to reporting or tax liabilities, the department shall add a penalty of ten percent of the amount of the additional tax found due because of the failure to follow the instructions. A taxpayer disregards specific written instructions when the department of revenue has informed the taxpayer in writing of the taxpayer's tax obligations and the taxpayer fails to act in accordance with those instructions unless the department has not issued final instructions because the matter is under appeal pursuant to this chapter or departmental regulations. The department shall not assess the penalty under this section upon any taxpayer who has made a good faith effort to comply with the specific written instructions provided by the department to that taxpayer. Specific written instructions may be given as a part of a tax assessment, audit, determination, or closing agreement, provided that such specific written instructions shall apply only to the taxpayer addressed or referenced on such documents. Any specific written instructions by the department of revenue shall be clearly identified as such and shall inform the taxpayer that failure to follow the instructions may subject the taxpayer to the penalties imposed by this subsection.

(5) If the department finds that all or any part of the deficiency resulted from an intent to evade the tax payable

hereunder, a further penalty of fifty percent of the additional tax found to be due shall be added.

(6) The aggregate of penalties imposed under this section for failure to pay a tax due on a return by the due date, late payment of any tax, increase, or penalty, or issuance of a warrant shall not exceed thirty-five percent of the tax due, or twenty dollars, whichever is greater.

(7) The department of revenue may not impose both the evasion penalty and the penalty for disregarding specific written instructions on the same tax found to be due. [1992 c 206 § 3; 1991 c 142 § 11; 1987 c 502 § 9; 1983 2nd ex.s. c 3 § 23; 1983 c 7 § 32; 1981 c 172 § 8; 1981 c 7 § 2; 1971 ex.s. c 179 § 1; 1967 ex.s. c 149 § 26; 1965 ex.s. c 141 § 3; 1963 ex.s. c 28 § 7; 1961 c 15 § 82.32.090. Prior: 1959 c 197 § 12; 1955 c 110 § 1; 1951 1st ex.s. c 9 § 9; 1949 c 228 § 23; 1937 c 227 § 18; 1935 c 180 § 192; Rem. Supp. 1949 § 8370-192.]

. . . .

82.32.150 Contest of tax—Prepayment required—Restraining orders and injunctions barred. All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state. [1961 c 15 § 82.32.150. Prior: 1935 c 180 § 198; RRS § 8370-198.]

82.32.160 Correction of tax—Administrative procedure—Conference—Determination by department. Any person having been issued a notice of additional taxes, delinquent taxes, interest, or penalties assessed by the department, may within thirty days after the issuance of the original notice of the amount thereof or within the period covered by any extension of the due date thereof granted by the department petition the department in

writing for a correction of the amount of the assessment, and a conference for examination and review of the assessment. The petition shall set forth the reasons why the correction should be granted and the amount of the tax, interest, or penalties, which the petitioner believes to be due. The department shall promptly consider the petition and may grant or deny it. If denied, the petitioner shall be notified by mail thereof forthwith. If a conference is granted, the department shall fix the time and place therefor and notify the petitioner thereof by mail. After the conference the department may make such determination as may appear to it to be just and lawful and shall mail a copy of its determination to the petitioner. If no such petition is filed within the thirty-day period the assessment covered by the notice shall become final.

The procedures provided for herein shall apply also to a notice denying, in whole or in part, an application for a pollution control tax exemption and credit certificate, with such modifications to such procedures established by departmental rules and regulations as may be necessary to accommodate a claim for exemption or credit. [1989 c 378 § 22; 1975 1st ex.s. c 158 § 4; 1967 ex.s. c 26 § 49; 1963 ex.s. c 28 § 8; 1961 c 15 § 82.32.160. Prior: 1939 c 225 § 29, part; 1935 c 180 § 199, part; RRS § 8370-199, part.]

. . . .

82.32.180 Court appeal—Procedure. Any person, except one who has failed to keep and preserve books, records, and invoices as required in this chapter and chapter 82.24 RCW, having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in chapter 82.32 RCW or, if an application for refund has been made to the department within that time limitation, then within thirty days after rejection of the application, whichever time limitation is later. In the appeal the taxpayer shall set forth the amount of the tax imposed upon the taxpayer which the taxpayer concedes to be the correct tax and the reason why the tax should be reduced or

abated. The appeal shall be perfected by serving a copy of the notice of appeal upon the department within the time herein specified and by filing the original thereof with proof of service with the clerk of the superior court of Thurston county.

The trial in the superior court on appeal shall be de novo and without the necessity of any pleadings other than the notice of appeal. The burden shall rest upon the taxpayer to prove that the tax as paid by the taxpayer is incorrect, either in whole or in part, and to establish the correct amount of the tax. In such proceeding the taxpayer shall be deemed the plaintiff, and the state, the defendant; and both parties shall be entitled to subpoena the attendance of witnesses as in other civil actions and to produce evidence that is competent, relevant, and material to determine the correct amount of the tax that should be paid by the taxpayer. Either party may seek appellate review in the same manner as other civil actions are appealed to the appellate courts.

It shall not be necessary for the taxpayer to protest against the payment of any tax or to make any demand to have the same refunded or to petition the director for a hearing in order to appeal to the superior court, but no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided.

The provisions of this section shall not apply to any tax payment which has been the subject of an appeal to the board of tax appeals with respect to which appeal a formal hearing has been elected. [1992 c 206 § 4; 1989 c 378 § 23; 1988 c 202 § 67; 1971 c 81 § 148; 1967 ex.s. c 26 § 51; 1965 ex.s. c 141 § 5; 1963 ex.s. c 28 § 9; 1961 c 15 § 82.32.180. Prior: 1951 1st ex.s. c 9 § 12; 1939 c 225 § 29, part; 1935 c 180 § 199, part; RRS § 8370-199, part.]

. . . .

82.32.210 Tax warrant—Filing—Lien—Effect. If any fee, tax, increase, or penalty or any portion thereof is not paid within fifteen days after it becomes due, the department of revenue

may issue a warrant under its official seal in the amount of such unpaid sums, together with interest thereon at the rate of one percent of the amount of such warrant for each thirty days or portion thereof after the date of such warrant. If, however, the department of revenue believes that a taxpayer is about to cease business, leave the state, or remove or dissipate the assets out of which fees, taxes or penalties might be satisfied and that any tax or penalty will not be paid when due, it may declare the fee, tax or penalty to be immediately due and payable and may issue a warrant immediately.

The department shall file a copy of the warrant with the clerk of the superior court of any county of the sate in which real and/or personal property of the taxpayer may be found. Upon filing, the clerk shall enter in the judgment docket, the name of the taxpayer mentioned in the warrant and in appropriate columns the amount of the fee, tax or portion thereof and any increases and penalties for which the warrant is issued and the date when the copy is filed, and thereupon the amount of the warrant so docketed shall become a specific lien upon all goods, wares, merchandise, fixtures, equipment, or other personal property used in the conduct of the business of the taxpayer against whom the warrant is issued, including property owned by third persons who have a beneficial interest, direct or indirect, in the operation of the business, and no sale or transfer of the personal property in any way affects the lien. The lien shall not be superior, however, to bona fide interests of third persons which had vested prior to the filing of the warrant when the third persons do not have a beneficial interest, direct or indirect, in the operation of the business, other than the securing of the payment of a debt or the receiving of a regular rental on equipment: PROVIDED, HOWEVER, That the phrase "bona fide interests of third persons" does not include any mortgage of real or personal property or any other credit transaction that results in the mortgagee or the holder of the security acting as trustee for unsecured creditors of the taxpayer mentioned in the warrant who executed the chattel or real property mortgage or the document evidencing the credit transaction. The amount of the warrant so docketed shall thereupon also become a lien upon the title to and interest in all other real and personal

property of the taxpayer against whom it is issued the same as a judgment in a civil case duly docketed in the office of the clerk. The warrant so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the state in the manner provided by law in the case of judgments wholly or partially unsatisfied. [1987 c 405 § 15; 1983 1st ex.s. c 55 § 8; 1967 ex.s. c 89 § 3; 1961 c 15 § 82.32.210. Prior: 1955 c 389 § 38; prior: 1951 1st ex.s. c 9 § 13; 1949 c 228 § 225, part; 1937 c 227 § 20, part; 1935 c 180 § 202, part; Rem. Supp. 1949 § 8370-202, part.]

. . . .

82.32.220 Execution of warrant—Levy upon property—Satisfaction. The department of revenue may issue an order of execution, pursuant to a filed warrant, under its official seal directed to the sheriff of the county in which the warrant has been filed, commanding him to levy upon and sell the real and/or personal property of the taxpayer found within his county, or so much thereof as may be necessary, for the payment of the amount of the warrant, plus the cost of executing the warrant, and return the warrant to the department of revenue and pay to it the money collected by virtue thereof within sixty days after the receipt of the warrant. The sheriff shall thereupon proceed upon the same in all respects and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgments of the superior court.

The sheriff shall be entitled to fees as provided by law for his services in levying execution on a superior court judgment and the clerk shall be entitled to a filing fee as provided by law, which shall be added to the amount of the warrant.

The proceeds received from any sale shall be credited upon the amount due under the warrant and when the final amount due is received, together with interest, penalties, and costs, the judgment docket shall show the claim for taxes to be satisfied and the clerk of the court shall so note upon the docket. Any surplus received from any sale of property shall be paid to the taxpayer or to any lien holder entitled thereto. If the return on the warrant

shows that the same has not been satisfied in full, the amount of the deficiency shall remain the same as a judgment against the taxpayer which may be collected in the same manner as the original amount of the warrant. [1983 1st ex.s. c 55 § 10; 1961 c 304 § 6; 1961 c 15 § 82.32.220. Prior: 1955 c 389 § 39; prior: 1951 1st ex.s. c 9 § 14; 1949 c 228 § 25, part; 1937 c 227 § 20, part; 1935 c 180 § 202, part; Rem. Supp. 1949 § 8370-202, part.]

. . . .

82.32.290 Unlawful acts—Penalties. (1)(a) It shall be unlawful:

(i) For any person to engage in business without having obtained a certificate of registration as provided in this chapter;

(ii) For the president, vice-president, secretary, treasurer, or other officer of any company to cause to permit the company to engage in business without having obtained a certificate of registration as provided in this chapter;

(iii) For any person to tear down or remove any order or notice posted by the department;

(iv) For any person to aid or abet another in any attempt to evade the payment of any tax or any part thereof;

(v) For any purchaser to fraudulently sign a resale certificate without intent to resell the property purchased; or

(vi) For any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the department or its duly authorized agent; or to fail or refuse to permit the inspection or appraisal of any property by the department or its duly authorized agent; or to refuse to offer testimony or produce any record as required.

(b) Any person violating any of the provisions of this subsection (1) shall be guilty of a gross misdemeanor in accordance with chapter 9A.20 RCW.

(2)(a) It shall be unlawful:

(i) For any person to engage in business after revocation of a certificate of registration;

(ii) For the president, vice-president, secretary, treasurer, or other office of any company to cause or permit the company to engage in business after revocation of a certificate of registration; or

(iii) For any person to make any false or fraudulent return or false statement in any return, with intent to defraud the state or evade the payment of any tax or part thereof.

(b) Any person violating any of the provisions of this subsection (2) shall be guilty of a class C felony in accordance with chapter 9A.20 RCW.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DIGITAL EQUIPMENT CORPORATION,

Plaintiff,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Defendant.

(EXCERPTED)

VIDEOTAPED PROCEEDINGS

OCTOBER 27, 1995

ORAL ARGUMENTS

FOR THE PLAINTIFF, MICHAEL B. KING

FOR THE DEFENDANT, DONALD COFFER, AAG

[8:9-9:1]

JUSTICE TALMADGE: Counsel, is that your case? In your particular situation, did your client actually pay out-of-state gross receipt taxes on its manufacturing operations?

MR. KING: We were not actually double taxed, but that goes to the question of remedy, Your Honor.

JUSTICE TALMADGE: Counsel, then, doesn't that point out the fact that the reason the litigants in Tyler Pipe initiated the lawsuit and ultimately secured the remedy they sought was because they were adversely affected by the fact that they paid out-of-state gross receipts tax unconstitutionally? They blazed the trail, and now you come along and argue for a refund when you weren't even harmed in the way that prompted the original litigants to file suit.

MR. KING: Well, Your Honor's question introduces a second issue, and that's the nature of the harm. Let me answer that in two parts.

. . . .

[9:13-10:18]

Now, as to the question of injury, I think we're missing a fundamental point here if we buy into the state's analysis that somehow we're asking for a windfall, to be given back money when we weren't injured.

We most certainly were injured. Digital's money was taken under color of taxing authority later held to be unconstitutional. And it has long been the law, and the United States Supreme Court has repeatedly held as a general proposition that a taxpayer is entitled to return of its money in such circumstances.

This is the way the court put the matter in Ward v. Love County, a case that was cited with approval in McKesson and Reich.

It is a well settled rule that money got through imposition may be recovered back. And, as this Court has said on several occasions, the obligation to do justice rests upon all persons, natural or artificial. And if a county -- in that case a county -- obtains the money or property of others without authority, the law independent of any statute will compel restitution or compensation. To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate property arbitrarily and without due process of law. Of course this would be in controversion [sic] of the Fourteenth Amendment which binds the county as an agency of the state.

Our injury is that our money was taken from us without proper authority. We are presumptively under the Fourteenth Amendment, the due process clause -- Digital, I should say -- is entitled to the return of that money.

[35:9-39:4]

JUSTICE ALEXANDER: Counsel, the Attorney General says you have a remedy under 82.04.440 for any -- to redress any grievance you have. Why aren't you happy with that?

MR. KING: Well, we're not happy with it, Your Honor, because the application of that remedy, even if it's allowed by state law, will violate the due process clause. The due process clause requires that when somebody's money is taken from them illegally, it must be returned. There are only three exceptions to that.

Number one, if there is a pre-deprivation alternative to the pay-and-sue course. You know, most of us in almost all circumstances in all states, what we've got to do is if our taxes are taken from us and we don't think it -- if our money is taken from us as taxes and we don't think it's right, then we've got to pay and

sue to get it back. The due process clause says if there's a pre-deprivation alternative to that, then a refund can be denied.

There is no such alternative available. This Department has never contended that there was such an alternative available. At the time that Digital paid its tax, the remedy, and the only remedy, was the pay-and-sue remedy.

The second exception is that in these commerce clause and intergovernmental immunity situations, where there's an invalidation because of facial discrimination, the due process clause will allow a state, if it otherwise has the authority, to impose an adjusting retroactive tax on the benefit of local taxpayers. The Department has never claimed it's going to do that. The Department has never claimed it has the authority to do that. That alternative is also not before the Court.

There is only one other circumstance under which the due process clause allows a refund to be denied. That is if, as the Reynoldsville court said, there is a preexisting separate and independent rule of state law that provides a basis for denying the refund. For example, suppose a state has a protest requirement, you you've got to formally protest when you pay your taxes if you want to get them back. We only have that in this state for the ad valorem property taxes. RCW 82.32.060 expressly says you don't have to protest.

The credit law is the antithesis of a preexisting separate and independent rule of law. It was adopted after the taxes were paid. It was adopted precisely in order to avoid having to give refunds if the United States Supreme Court down the line said there has to be retroactive relief.

JUSTICE PEKELIS: Where does the McKesson test fit in, this meaningful backward relief?

MR. KING: I think the McKesson test, Your Honor, was the court's reminder -- and it hadn't dealt with the issues for a long time and finally it felt it had to do so -- that the due process clause

imposes limits on the ability of a state to deny a remedy. And McKesson said there must be meaningful backward-looking relief, but in that case it was dealing with a situation where the taxpayers were saying, we want a refund for the difference in the tax we pay. It didn't have to confront this broader issue that's presented with this case.

Reich and Reynoldsville come down the line, and in Reich the court says there's an additional element here: You may not reconfigure the remedy after the fact to deny the refund remedy that was previously available. Reynoldsville then further articulates this point, and it says --

JUSTICE PEKELIS: Counsel, does due process even apply? I mean, is there a violation of due process even when there isn't a hearing and there isn't all the indicia of due process but there is no injury?

MR. KING: There is injury, Your Honor. See, that's where we're going wrong here. It's this whole windfall business. The state says these people are going to get a windfall. The state's assumption is that it's the state's money and we just want it back. It's our money.

The United States Supreme Court in McKesson and Reich reviewed a series of cases from the teens and twenties and thirties: Ward v. Love County, Carpenter v. Shaw and others. In those cases -- and I quoted the Ward v. Love County case for you. In those cases the United States Supreme Court said what used to be recognized as a fundamental principal -- and I think that some advocates on the part of state departments of revenue lost track of it -- when your money is taken from you without authority of law that's an injury. The due process clause forbids it. You are entitled to a refund. It's a basic principal of restitution. Somebody takes something from you without color of law, you're entitled to the money back. That's our injury.

In Tyler Pipe many of the litigants weren't double taxed, but they were claiming for refunds as well. So, in fact, there is

not a question of windfall here for a noninjury. The injury is the taking of the money without authority of law. The due process clause presumes that you get a refund.

Supreme Court, U.S.
FILED
MAY 12 1997
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No. 96-1274

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

DIGITAL EQUIPMENT CORPORATION,

Petitioner,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Washington

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent would restate the question presented in petitioner Digital Equipment Corporation's petition for writ of certiorari as follows:

> Whether the Due Process Clause of the Fourteenth Amendment, as interpreted in *Reich v. Collins*, 513 U.S. 106 (1994), and *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745 (1995), prevents a State found to have imposed an impermissibly discriminatory tax in violation of the Commerce Clause from retroactively reformulating the tax in a manner consistent with the Commerce Clause and, having done so, retaining any taxes appropriately levied upon interstate taxpayers pursuant to that reformulated tax.

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Respondent State of Washington, Department of Revenue, respectfully requests that this Court deny petitioner Digital Equipment Corporation's petition for writ of certiorari, seeking review of the Washington Supreme Court's decision in this case, reported at 129 Wash. 2d 177 and 916 P.2d 933.

OPINIONS BELOW

Digital's petition identifies most but not all of the relevant opinions and orders of the Thurston County Superior Court. The superior court's November 7, 1994 letter opinion (App., *infra*, 1a-2a) is unreported.

STATEMENT

Proceedings in this Case in the Thurston County Superior Court. On August 27, 1987, approximately two months after this Court issued its decision in *Tyler Pipe Indus., Inc. v. Washington Dep't of Rev.*, 483 U.S. 232 (1987), and approximately two weeks after the Washington Legislature amended the multiple activities exemption statute declared unconstitutionally discriminatory in *Tyler Pipe*, Digital filed a refund complaint in the Thurston County Superior Court. The complaint alleged that the Washington business and occupation (B&O) taxes Digital had paid to the State of Washington between January 1, 1983, and July 31, 1987, for Digital's sales in Washington of products it had manufactured outside Washington, were unconstitutional and demanded a refund of all such taxes.

In 1988, Digital filed an amended refund complaint for similar taxes paid for tax periods through December 31, 1987.

In April 1994, Digital moved for partial summary judgment. In its supporting memorandum, Digital abandoned all claims in its amended complaint for tax periods after August 11, 1987, *see* Pet. App. 46a, stating that it

> does not challenge the Washington Supreme Court's decision [in *American Nat'l Can Corp. v. Department of Rev.*, 114 Wash. 2d 236, 787 P.2d 545, *cert. denied*, 498 U.S. 880

> (1990)] that the 1987 credit law remedied the defects found by the United States Supreme Court in *Tyler Pipe* after August 11, 1987.

App., *infra*, 16a. Digital still claimed, however, that it was entitled to a full refund of all B&O taxes paid for its sales in Washington from January 1, 1983, through August 11, 1987, of products it had manufactured outside Washington. App., *infra*, 11a-23a.[1] In its moving papers, Digital admitted it did not pay any extracting or manufacturing gross receipts taxes to any other jurisdiction for any of the products it sold in Washington from January 1, 1983, through August 11, 1987. App., *infra*, 5a, 19a. The Department filed a cross-motion for summary judgment, seeking dismissal of the action with prejudice.

The superior court issued a letter opinion in September 1994, granting partial summary judgment of dismissal in favor of the Department as to all tax periods before June 23, 1987, but reserving ruling on the period from June 23 through August 11, 1987, pending further oral argument. Pet. App. 40a-45a.

In October 1994, before any formal partial summary judgment order was entered, Digital moved for reconsideration. *See* Pet. App. 46a; App, *infra*, 40a-48a. The Department filed a memorandum in opposition and a supporting affidavit.

On November 7, 1994, the superior court issued a letter opinion concluding that (1) Digital's reconsideration motion should be denied and (2) the Department was entitled to summary judgment of dismissal for tax periods from June 23 through August 11, 1987. App., *infra*, 1a-2a. On November 18, 1994, the court entered a formal summary judgment order dismissing Digital's action with

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[1]The Washington Legislature enacted the current multiple activities tax credit in RCW 82.04.440 on August 11, 1987, in response to this Court's decision in *Tyler Pipe*, issued on June 23, 1987. *See* 1987 Wash. Laws, 2d Ex. Sess., ch. 3. Thus, in its motion for partial summary judgment, Digital limited its refund request to wholesaling and retailing B&O taxes it had paid before the current multiple activities credit was enacted.

prejudice. Pet. App. 46a-49a. Digital filed a timely appeal to the Washington Supreme Court.

Proceedings in this Case in the Washington Supreme Court. The Washington Supreme Court issued its decision in this case on May 23, 1996. The decision unanimously affirmed the summary judgment of the Thurston County Superior Court. Pet. App. 1a-38a. There were three separate opinions supporting the affirmance, however, and none of the three expressed the *ratio decedendi* of a majority of the Washington Supreme Court for its unanimous judgment.

The three-judge lead opinion. A three-judge lead opinion written by Justice Charles Smith announced the judgment of the Washington Supreme Court affirming the superior court's summary judgment.[2] The three judges reasoned that this Court "is considered to have applied a decision to the parties before it when it has not explicitly reserved the question whether its holding should be applied retroactively" and that when this Court remands a case "exclusively for resolution of remedial issues," it "has not reserved the question of retroactive application of that case." Pet. App. 17a-18a. The three judges concluded that in *Tyler Pipe*, this Court "did not reserve the question of retroactivity, but instead remanded only for resolution of remedial issues." *Id.* at 18a. Thus, because (in their view) this Court applied the "new pronouncement of federal law to the parties then before the Court" in *Tyler Pipe*, that decision "must be applied retroactively to tax periods predating its pronouncement." *Id.* at 17a-

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[2]Digital refers to this three-judge lead opinion of Justice Smith as "his opinion for the court," Pet. 12, implying that the lead opinion reflected the views of a majority of the nine members of the Washington Supreme Court with respect to all the issues addressed in that opinion, including the issue whether the taxes paid by Digital for tax periods before June 23, 1987 were unconstitutional, *see* Pet. 12-15. As explained below, Justice Smith's lead opinion at most was a majority opinion only with respect to the seven-week "interim period" from June 23 to August 11, 1987, the period between this Court's *Tyler Pipe* decision and the Washington Legislature's subsequent enactment of the 1987 two-way credit law. A majority of the court disagreed sharply with Justice Smith's analysis of the issues concerning all tax periods before June 23, 1987.

18a. Accordingly, they concluded that *National Can Corp. v. Department of Rev.*, 109 Wash. 2d 878, 749 P.2d 1286, *appeal dismissed, cert. denied*, 486 U.S. 1040 (1988) (*National Can II*) should be overruled to the extent that it "conflicts with this interpretation of federal retroactivity law." *Id.* at 18a. In essence, the three judges concluded that the Washington Supreme Court erroneously addressed in *National Can II* an issue that was not among those left open on remand by the mandate of this Court in *Tyler Pipe*.

Because (in their view) *Tyler Pipe* must be applied retroactively to Digital's refund claim, Digital "conceivably might be entitled to some type of relief." Pet. App. 12a. This brought "the 1987 credit law into operation." *Id.* Retroactive application of the two-way credit for gross receipts taxes paid to other jurisdictions, they concluded, created in hindsight a nondiscriminatory scheme and therefore satisfied due process requirements as a postdeprivation remedy. *Id.* at 12a-18a.

In summary, the three judges stated that Digital's refund claim required consideration of two tax periods. Pet. App. 17a. Because the 1987 two-way credit law "clearly applies to the interim period" from June 23 through August 11, 1987, Digital could claim credits (refunds) for any qualifying manufacturing or extracting gross receipts taxes it paid during that period. *Id.*[3] However, because Digital paid no gross receipts taxes to any other jurisdiction on the products it sold in Washington, it was entitled to no relief. *Id.* As to the earlier tax period from January 1, 1983 through June 22, 1987, they reasoned that Digital "conceivably would have been entitled to credits for this period as well." *Id.* In their view, the 1987 two-way credit law applies "to tax periods prior to June 23, 1987." *Id.*

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[3]The three judges mistakenly quoted RCW 82.04.440(4) in connection with their discussion of the relief to which they concluded Digital Equipment is entitled for the "interim period" from June 23 through August 11, 1987, and for the earlier tax period also at issue from January 1, 1983 until June 23, 1987. *See* Pet. App. 15a. The correct reference is RCW 82.04.440(2), since Digital is an out-of-state manufacturer that paid Washington retailing and wholesaling B&O taxes under RCW 82.04.250 and 82.04.270. *See* Pet. App. 56a.

BEST AVA

However, "in this instance as well," Digital was entitled to no refund because it paid no gross receipts taxes to any other jurisdiction on the products it sold in Washington. *Id.*

The two-judge "concurring opinion." A two-judge "concurring opinion" written by Chief Justice Barbara Durham concurred in the judgment that Digital "is not entitled to any relief" but employed substantially different reasoning than the lead opinion to explain the same result. Pet. App. 20a-31a. The two judges stated that they concurred in the lead opinion's "determination to overrule" the prospectivity holding in *National Can II*. *Id.* at 20a. They disagreed, however, with the lead opinion's "assumption" that the issue under *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), was "whether the Supreme Court applied *Tyler Pipe* to the parties before it." *Id.* They reasoned instead that the "proper formulation of the retroactivity issue here" was whether the Washington Supreme Court, in *National Can II*, "should have retroactively applied" *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), because "[n]otwithstanding our efforts in [*National Can I*] to distinguish *Armco*," *Armco* "in fact required the partial invalidation of the Washington business and occupation (B&O) tax scheme." *Id.* at 20a-21a. Therefore, "[t]he relevant new rule of law was *Armco*, not *Tyler Pipe*." *Id.* at 21a. They also reasoned that "*Armco* did not reserve the issue of retroactivity and can, therefore, be understood to apply retroactively." "Because the Supreme Court applied *Armco* retroactively, it was error, under [*James Beam*], for this court to not follow suit in *National Can II*." *Id.*

Although stating they would overrule the prospectivity holding in *National Can II*, the two judges nevertheless cautioned that the lead opinion "should not casually assume" (1) that "an out-of-state manufacturer like Digital has a valid discrimination claim under the old multiple activities exemption" or (2) that "the 1987 two-way credit scheme is the appropriate remedy for such discrimination." Pet. App. 20a-21a.

Addressing the first of these two points, the two judges concluded that this Court did not hold in *Tyler Pipe* that the former

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multiple activities exemption discriminated against out-of-state manufacturers paying wholesaling or retailing B&O taxes in Washington. Pet. App. 24a-27a. They asserted that this Court "limited its holding to a determination that the old [multiple activities exemption] discriminated against *Washington manufacturers* who sold their products *outside* the state[.]" *Id.* at 24a (italics added). They also contended that the Washington Supreme Court has "never actually held that out-of-state manufacturers are entitled to relief under *Tyler Pipe* or that a credit for out-of-state manufacturing taxes is necessary." *Id.* at 26a.[4]

Applying their analysis of *Tyler Pipe* to the instant case, the two judges concluded:

> *Tyler Pipe* held that the [multiple activities exemption] discriminated against Washington manufacturers who sold their products outside the state. 483 U.S. at 253. Our determination in *B.F. Goodrich Co.* [*v. State*, 38 Wash. 2d 663, 668, 231 P.2d 325, *cert. denied*, 342 U.S. 876 (1951)] that out-of-state manufacturers cannot complain of the discriminatory effect of the [multiple activities exemption] has not been reversed. Nevertheless, Digital asserts that it is entitled to a refund for the wholesale taxes it has already paid. We can easily dispose of that claim on its merits.

---

[4]The two judges recognized that in *American Nat'l Can*, the Washington Supreme Court seemingly held that the 1987 two-way credit scheme, including the credit for manufacturing taxes paid to other jurisdictions by out-of-state manufacturers selling their products in Washington, applies retroactively to the seven-week "interim period" between the date of the *Tyler Pipe* decision, June 23, 1987, and the effective date of the 1987 credit act, August 11, 1987. *See American Nat'l Can*, 114 Wash. 2d at 250-51.

The two judges concluded, however, that the Washington Supreme Court did not "actually" hold in *American Nat'l Can* that out-of-state manufacturers were entitled to relief under *Tyler Pipe* for the interim period or that the 1987 two-way credit scheme therefore applied retroactively to the interim period. Pet. App. 26a. Rather, they concluded, the Washington Supreme Court merely "accepted the State's [erroneous] concession that taxpayers were entitled to the two-way credit remedy during the interim period." *Id.* at 27a, 29a-30a.

Pet. App. 27a (footnotes omitted). Thus, the two judges reasoned that out-of-state manufacturers like Digital have no "valid discrimination claim[s] under the old multiple activities exemption" regardless of whether *Tyler Pipe* applies retroactively. *Id.* at 21a.

"Assuming, arguendo, that Digital has a valid discrimination claim," the two judges further rejected the "almost universal assumption that the 1987 two-way credit scheme is necessary to cure the discrimination created by the old [multiple activities exemption]." Pet. App. 28a-29a. They concluded that the 1985 one-way credit scheme applies retroactively as a matter of state law to all tax periods before August 11, 1987, "[i]n the absence of any final court decision holding that the 1985 one-way credit scheme is discriminatory." *Id.* at 29a.

The two judges concluded that retroactive application of the 1985 one-way credit scheme is "a constitutionally adequate remedy" consistent with federal due process requirements. Pet. App. 30a. Still merely assuming, arguendo, that Digital had a valid discrimination claim under the old multiple activities exemption scheme for the tax periods at issue, they reasoned:

> The retroactive application of the 1985 one-way tax credit scheme creates a non-discriminatory B&O tax scheme. The wholesale tax credit against manufacturing taxes is available without regard to whether the goods are sold locally or out of state. The wholesale tax is levied on all goods sold in Washington without regard to where they were manufactured. Although some Washington manufacturers may be entitled to relief under the one-way credit scheme, the wholesale taxes actually imposed on out-of-state manufacturers, like Digital, are nondiscriminatory as applied. As a result, Digital is not entitled to any relief from those taxes.

Id. at 31a.

The four-judge "dissenting opinion." A four-judge "dissenting opinion" (more accurately labeled as the plurality opinion) also concurred in the judgment, but employed different reasoning than

either of the other two opinions to explain the unanimous result. Pet. App. 32a-38a. The four judges discussed only the retroactivity of *Tyler Pipe*, an issue that related to only one of the two tax periods at issue--the period from January 1, 1983 to June 23, 1987. With respect to that period, they concurred in the judgment on the basis that *Tyler Pipe* applies prospectively only. *Id.* at 32a-37a. They disagreed sharply with the three-judge lead opinion's reasoning that this Court in *Tyler Pipe* did not reserve the issue of the retroactivity of the new discrimination rule announced in that decision and therefore applied the new rule to the parties in *Tyler Pipe*. *Id.* at 36a. Thus, they reasoned that the trial court should be affirmed as to the tax period from January 1, 1983 to June 23, 1987 because the former multiple activities exemption should not be regarded as unconstitutional until June 23, 1987.

The other tax period at issue--the "interim period" from June 23 to August 11, 1987--was addressed only implicitly in the four-judge plurality opinion. By stating that they "dissented" only "on the retroactivity issue," the four judges apparently concurred in the lead opinion's reasoning with respect to the interim period after *Tyler Pipe*. Pet. App. 32a. The concluding paragraph of the plurality opinion, stating that the four judges "would affirm the trial court," reinforces this understanding of their reasoning. *Id.* at 37a. The superior court granted summary judgment to the Department for the period from June 23 to August 11, 1987 because it concluded that the 1987 two-way credit law applies retroactively to that period and that *McKesson* permits that result. App., *infra*, 1a-2a. This was essentially the same reasoning the three-judge lead opinion employed to affirm the trial court's judgment with respect to the interim period. Pet. App. 12a-17a.

Digital's misunderstanding of the Washington Supreme Court's holding. Throughout its petition, Digital argues that the Washington Supreme Court has "now acknowledged in this case" that out-of-state manufacturers such as Digital "are entitled to retrospective relief" under *Tyler Pipe* for "illegally collected" wholesaling and retailing B&O taxes paid for tax periods before June

23, 1987. *See* Pet. i, 12-16, 24-25. However, the Washington Supreme Court, in its badly splintered decision, did not hold that the wholesaling and retailing taxes Digital paid for such pre-*Tyler Pipe* tax periods were unconstitutional. Instead, the court held only that an out-of-state manufacturer (which concedes that it paid no manufacturing or extracting gross receipts taxes to any other jurisdiction for the products it sold in Washington) is entitled to no refunds of wholesaling or retailing B&O taxes paid for such pre-*Tyler Pipe* tax periods.

The Washington courts have adopted the following rule of stare decisis: "Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." *State v. Zakel*, 61 Wash. App. 805, 812 P.2d 512 (1991), *aff'd on other grounds*, 119 Wash. 2d 563, 834 P.2d 1046 (1992).[5] Applying this rule to the Washington Supreme Court's decision in this case leads to the following conclusions. First, with respect to the seven-week interim period immediately after *Tyler Pipe*, a seven-judge majority (the three-judge lead opinion and the four-judge "dissenting opinion") apparently agreed that the wholesaling and retailing B&O taxes Digital paid for Washington sales during that period violated the Commerce Clause, and that the appropriate relief under Washington law was to cure the violation by granting Digital credits for any manufacturing or extracting gross receipts taxes Digital paid to other jurisdictions. Thus, that seven-judge majority apparently reaffirmed the Washington court's previous unanimous holding in *American Nat'l Can* that the 1987 two-way credit law applies retroactively to the interim period as the exclusive remedy under state law.

Second, with respect to the wholesaling and retailing B&O taxes Digital paid for tax periods before June 23, 1987, this case probably has no precedential value. It seems clear, however, that a six-judge majority (the two-judge "concurring opinion" and the four-

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[5] *Cf. Marks v. United States*, 430 U.S. 188, 193 (1977) (applying similar stare decisis rule as a matter of federal law).

judge "dissenting opinion") disagreed with the analysis of the three-judge lead opinion regarding such tax periods. Indeed, that six-judge majority apparently agreed among themselves that the wholesaling and retailing taxes Digital paid for such tax periods did not discriminate against interstate commerce, although there was no majority agreement as to the rationale for that conclusion. Because of the drastic differences in the rationales of the two-judge "concurring opinion" and the four-judge "dissenting opinion," it is doubtful that any further common ground between the two opinions can be identified. Thus, the lower Washington appellate courts should not deem themselves bound to follow the reasoning of any of the three opinions in this case for any pre-*Tyler Pipe* tax periods.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The question presented was neither addressed by nor properly presented to the state courts below.

In reviewing state court judgments under 28 U.S.C. § 1257, this Court will not consider a petitioner's federal question unless it was either addressed by or properly presented to the state courts. *Street v. New York*, 394 U.S. 576, 581-85 (1969). As Digital apparently concedes here, *see* Pet. 13 & n.17, 15 & n.21, none of the three opinions of the Washington Supreme Court in this case explicitly addressed the due process claim presented in Digital's petition, which is based on Digital's interpretations of *Reich v. Collins*, 513 U.S. 106 (1994), and *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745 (1995).

When the highest state court's decision is silent on a federal question presented in a petition, this Court assumes that the issue was not properly presented in the state courts, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), and the petitioner bears the burden of defeating that assumption by demonstrating that the state courts had "a fair opportunity to address

the federal question that is sought to be presented," *Webb v. Webb*, 451 U.S. 493, 501 (1981).

To satisfy the requirement of proper presentation to the state courts, the petitioner must show "[a]t the minimum," that the state courts "were apprised of the nature or substance" of the federal question "at the time and in the manner required by state law," *id.* at 501, or show persuasively that state procedural requirements could not serve as an independent and adequate state law ground for the highest state court's judgment, *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978).

Washington Rule of Appellate Procedure (RAP) 9.12 provides in part: "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." App, *infra*, 10a. The Washington appellate courts have enforced this rule consistently when reviewing orders granting or denying a motion for summary judgment, refusing to consider issues or legal theories that were not called to the attention of the superior court. *See, e.g.*, *Nelson v. McGoldrick*, 127 Wash. 2d 124, 140, 896 P.2d 1258 (1995); *Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wash. 2d 640, 649, 835 P.2d 1030 (1992); *Ford v. Hagel*, 83 Wash. App. 318, 322 n.1, 920 P.2d 260 (1996); *Cook v. Evanson*, 83 Wash. App. 149, 156-57, 920 P.2d 1123 (1996). The purpose of this state procedural rule is to avoid "undermin[ing] the rule that the appellate court is to engage in the same inquiry as the trial court in reviewing an order of summary judgment." *Washington Fed'n of State Employees, Council 28 v. Office of Fin. Management*, 121 Wash. 2d 152, 163, 849 P.2d 1201 (1993).

In the trial court below, Digital argued that it was entitled to a full refund of all taxes paid during all the tax periods in dispute. However, the legal theory supporting that claim was that the Due Process Clause, as interpreted in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), and in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), required such

relief--independent of any provisions of state law and despite any state law mandating different relief.

Digital filed five briefs in the trial court: (1) a memorandum supporting Digital's motion for partial summary judgment, App., *infra*, 11a-23a; (2) a response to the memorandum supporting the Department of Revenue's cross-motion for summary judgment, App., *infra*, 24a-33a; (3) a reply to the Department of Revenue's memorandum in opposition to Digital's motion for partial summary judgment, App., *infra*, 34a-39a; (4) Digital's motion for reconsideration and supporting memorandum, App., *infra*, 40a-48a; and (5) a reply memorandum in support of Digital's motion for reconsideration, App., *infra*, 49a-51a.

In the first brief, Digital argued that under the Due Process Clause, as interpreted in *Harper*, a state must either (1) award full refunds to taxpayers burdened by an unlawful tax or (2) issue some other order that creates in hindsight a non-discriminatory scheme. App., *infra*, 18a-19a. Digital then argued that "[t]o comply with *Harper*," the permissible remedies chosen by the state "must be substantially equivalent" to full refunds, and since retroactive application of the 1987 two-way credit law "provides for a significantly lesser credit rather than a full refund" to taxpayers, the state had not complied with "either of the rules set forth in *Harper*." App., *infra*, 19a-20a.

In the second brief, Digital repeated essentially the same arguments, citing *McKesson* in addition to *Harper*. App., *infra*, 26a-32a.

In the third brief, Digital again argued that "[f]ederal due process, as explained in *McKesson* and *Harper*, requires meaningful backward-looking relief" and that such requirement was not satisfied by the retroactive extension of the 1987 two-way credit law. App., *infra*, 36a-37a. Digital also argued that "[i]n essence," applying the 1987 amendments retroactively to Digital would "overrule" the *Tyler Pipe* decision, apparently because Digital would ultimately owe the same amount of taxes under the facts of this case. App., *infra*, 37a-38a.

In the fourth brief, Digital argued that *McKesson* requires "a clear and certain remedy which creates in hindsight a nondiscriminatory scheme," and that *McKesson* offers only three choices to create such a nondiscriminatory scheme: "(1) a full refund of the unconstitutional taxes collected, (2) a retroactive tax on taxpayers exempted from the B&O tax, or (3) a combination of the two remedies." App., *infra*, 47a. Digital then argued that "[i]n reality," however, there was only one option remaining in this case, "a full refund of the unconstitutional B&O taxes [Digital] paid between January 1, 1983 and August 11, 1987," because the statute of limitations for assessments against other taxpayers had long ago expired for those tax periods, "thereby eliminating options (2) and (3) above." App., *infra*, 47a. Digital also repeated its earlier argument that while states may grant relief "beyond the demands of federal due process," they may not confine taxpayers "to a lesser remedy," and that retroactive application of the 1987 two-way credit law would "confine Digital 'to a lesser remedy' which is forbidden by both *Harper* and *McKesson*." App., *infra*, 47a.

In the fifth brief, Digital argued, without further explanation, only that "the Due Process Clause requires 'meaningful backward-looking relief,'" and that in this case, "the Due Process Clause can only be satisfied by the court awarding a full refund of the unlawful B&O taxes collected," citing *McKesson*. App., *infra*, 50a.

With little difficulty, the trial court correctly rejected all the due process arguments Digital presented to it. It concluded that the Washington Legislature intended the 1987 two-way credit law to be applied retroactively "under conditions that apply to this controversy," and that *McKesson* permitted such retroactive application. App., *infra*, 1a-2a.

At no point did Digital present to the trial court the separate due process claim it now presents in its petition: (1) that until the enactment of the 1987 two-way credit law on August 11, 1987, Washington law (RCW 82.32.060) allegedly had mandated "the retrospective remedy of a full refund for the illegal exaction of tax monies," Pet. 5; (2) that the Washington Legislature allegedly

"substituted the new credit remedy for the usual refund remedy," passing the 1987 two-way credit law "after *Tyler Pipe*" and "for the express purpose of depriving taxpayers of their preexisting refund remedy" under Washington law if "a court ever required retroactive relief under *Tyler Pipe*," Pet. i, 13, 24; and (3) that any such "'after the fact' elimination of [a taxpayer's] refund remedy" allegedly violates the Due Process Clause, as interpreted in *Reich v. Collins*, 513 U.S. 106 (1994), and *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745 (1995), Pet. 13, 22-24.

Of course, "parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992). Since it is difficult to draw clear distinctions between the impermissible presentation of new issues that were not properly presented to the state courts and the permissible refinement of arguments in support of issues that were properly presented to the state courts, *see Illinois v. Gates*, 462 U.S. 213, 220 (1983), Digital undoubtedly will contend in reply that the due process claim presented in its petition is only a permissible "enlargement" of the due process claim presented in the trial court, *see Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899).

In view of the reasons for the "proper presentation" rule, however, the Court should resist Digital's attempt here to circumvent the rule. "[D]ue regard for the appropriate relationship of this Court to the state courts," *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940), demands that the Washington courts be given a fair opportunity--without ignoring normal state procedural rules--to address the federal question Digital now asks this Court to address. *See Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983).[6] In addition, requiring petitioners like

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[6]The mere fact that Digital relied in the trial court on the same clause in the Constitution--the Due Process Clause of the Fourteenth Amendment--on which it now relies in its petition obviously is insufficient to demonstrate that the Washington courts had a fair opportunity to address the federal question now presented. *See Exxon Corp. v. Eagerton*, *supra* (Supremacy Clause); *Beck v. Washington*, 369 U.S. 541 (1962) (Equal Protection Clause); *Wilson v. Cook*,

Digital to properly present their claims to the state courts permits those courts "to consider the applicability of state statutes" in light of the federal claims, *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969), and to avoid the federal claims on state law grounds. Digital's federal claim presented in its petition seems to rest on the crucial proposition that until the 1987 two-way credit law was enacted on August 11, 1987, RCW 82.32.060 mandated "the retrospective remedy of a full refund" whenever taxpayers successfully challenged Washington excise tax statutes as unconstitutionally discriminatory. However, Digital did not ever squarely present that state statutory construction issue to the state courts below--not even in its motion for reconsideration in the Washington Supreme Court. *See* Pet. 14-16. Under these circumstances, this Court should avoid "interpreting state laws" with which it is "generally unfamiliar" and "deciding . . . questions of federal law unnecessarily," *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 177 (1990) (plurality opinion), by rigorously enforcing the "proper presentation" rule to deny Digital's petition.

II. The Washington Supreme Court has not decided the question presented in a manner that conflicts with any due process decision of this Court.

As in *American Trucking Ass'ns v. Smith*, *supra*, analysis of the question presented in this case requires separate consideration of two tax periods. The first contested tax period in this case is from January 1, 1983 through June 22, 1987, a period before this Court's decision in *Tyler Pipe*. The second contested tax period is the seven-week "interim period" from June 23, 1987, the date of this Court's *Tyler Pipe* decision, through August 11, 1987, the date the Washington Legislature enacted the 1987 two-way credit law in

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327 U.S. 474 (1946) (Supremacy Clause); *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937) (Due Process Clause); *Dewey v. Des Moines*, *supra* (Due Process Clause).

response to that decision.[7] Because the analysis of Digital's federal claim is more straightforward when applied to the post-*Tyler Pipe* interim period, we will address that tax period first before discussing the issues involved in the earlier pre-*Tyler Pipe* tax period.

The interim period. As explained above, a seven-judge majority of the Washington Supreme Court in this case held that the

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[7]In the courts below, Digital conceded that it "does not challenge the Washington Supreme Court's decision [in *American Nat'l Can Corp. v. Department of Rev.*, 114 Wash. 2d 236, 787 P.2d 545, *cert. denied*, 498 U.S. 880 (1990)] that the 1987 credit law remedied the defects found by the United States Supreme Court in *Tyler Pipe* after August 11, 1987." App., *infra*, 16a.

In *American Nat'l Can*, the Washington Supreme Court held that the current version of RCW 82.04.440, as amended by the 1987 two-way credit law, complies with the Commerce Clause and eliminates any constitutional defects in the former version of the statute identified by this Court in *Tyler Pipe*. *American Nat'l Can*, 114 Wash. 2d at 241-49. The taxpayers in *American Nat'l Can* argued that "the law as amended discriminates against interstate commerce, just as its predecessor did." *Id.* at 241. In response, the Washington Supreme Court noted that this Court in *Tyler Pipe* provided "suggestions to our Legislature on how to remedy the constitutional violation." *Id.* at 242. The Washington Supreme Court was referring to the following portion of the *Tyler Pipe* opinion:

> Compliance with our holding on the discrimination issue . . . would not necessarily preclude the continued assessment of a wholesaling tax. Either a repeal of the manufacturing tax *or an expansion of the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other States* would presumably cure the discrimination.

483 U.S. at 248-49 (italics added). The Washington Supreme Court, after refuting the taxpayers' various arguments that the amended statute still discriminated against interstate commerce, concluded:

> The Supreme Court said that providing a credit for manufacturing taxes would cure the constitutional defect in Washington's B&O tax. The Legislature did this and more. The taxpayers concede that the State has remedied the internal consistency problem which the *Tyler [Pipe]* Court identified. The new tax law is constitutional.

114 Wn.2d at 249.

Thus, Digital has conceded at every stage of this litigation that the 1987 two-way credit law creates a nondiscriminatory tax scheme in full compliance with the Commerce Clause when applied to any tax periods after August 11, 1987.

wholesaling and retailing B&O taxes Digital paid for Washington sales of its products during the post-*Tyler Pipe* interim period violated the Commerce Clause. The same seven-judge majority held that the appropriate relief under Washington law was to cure the Commerce Clause violation by applying the 1987 two-way credit law retroactively to the interim period, thus granting Digital a credit (refund) for any manufacturing or extracting gross receipts taxes Digital paid to other jurisdictions for the same products. The court thereby reaffirmed its previous unanimous holding in *American Nat'l Can Corp. v. Department of Rev.*, 114 Wash. 2d 236, 249-53, 787 P.2d 545, *cert. denied*, 498 U.S. 880 (1990), that the 1987 two-way credit law applies retroactively to the interim period as the exclusive remedy under state law. The court in *American Nat'l Can* reasoned some relief was "clearly appropriate" for the interim period and that determination triggered retroactive application of the 1987 two-way credit system. 114 Wash. 2d at 250-51.[8] Consequently, the court held that the taxpayers in *American Nat'l Can* were not entitled to the full refunds they sought for the interim period, but were entitled only to whatever refunds the taxpayers could claim based on the credits authorized by the 1987 amendments.

In its petition, Digital now claims that such retroactive application of the two-way credit law to the interim period violates the Due Process Clause. Digital's claim hinges on all of the following three propositions: (1) that until the enactment of the 1987 two-way credit law on August 11, 1987, Washington law (RCW 82.32.060) allegedly had mandated "the retrospective remedy of a full refund for the illegal exaction of tax monies," Pet. 5; (2) that the Washington Legislature allegedly "substituted the new credit remedy for the usual refund remedy," passing the 1987 two-way credit law "after *Tyler Pipe*" and "for the express purpose of depriving taxpayers

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[8]Some form of relief was "clearly appropriate" for the interim period because that period was *after* this Court issued its decision in *Tyler Pipe*. *See American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 186-88, 200 (1990)(plurality opinion); *id.* at 200-01, 204-05 (Scalia, J., concurring in the judgment).

of their preexisting refund remedy" under Washington law if "a court ever required retroactive relief under *Tyler Pipe*," Pet. i, 13, 24; and (3) that any such "'after the fact' elimination of [a taxpayer's] refund remedy" allegedly violates the Due Process Clause, as interpreted in *Reich v. Collins*, 513 U.S. 106 (1994), and *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745 (1995), Pet. 13, 22-24. None of those three propositions is sound.

Digital contends that when "this Court decided *Armco* [in 1984], Washington provided the retrospective remedy of a full refund for the illegal exaction of tax monies." Pet. 5 (citing RCW 82.32.060). If Digital means to suggest that the Washington appellate courts, prior to 1984, had interpreted RCW 82.32.060 as requiring full refund awards whenever taxpayers successfully challenged Washington excise tax statutes as unconstitutionally discriminatory, then Digital is mistaken. No Washington appellate court had so held.

RCW 82.32.060 has never required "a full refund" whenever a tax statute is determined to be unconstitutionally discriminatory. RCW 82.32.060 merely directs the Department to pay "[a]ny judgment for which a recovery is granted by any court of competent jurisdiction, not appealed from, for tax, penalties, and interest which were paid by the taxpayer, and costs, in a suit by any taxpayer[.]" Pet. App. 60a. That statute provides no direction whatsoever to the "court of competent jurisdiction," however, as to what form or degree of relief, if any, is appropriate when a tax statute is held to be unconstitutionally discriminatory. *See, e.g., American Nat'l Can Corp. v. Department of Rev.*, 114 Wash. 2d 236, 251-52 & n.4, 787 P.2d 545, *cert. denied*, 498 U.S. 880 (1990); *Bond v. Burrows*, 103 Wash. 2d 153, 161-63, 690 P.2d 1168 (1984); RCW 82.98.030.

Equally inaccurate is Digital's related argument that, for the first time in the 1987 amendments to RCW 82.04.440, 1987 Wash. Laws, 2d Ex. Sess., ch. 3, § 3, the Washington Legislature made credits for gross receipts taxes paid to other jurisdictions "the exclusive remedy for illegal taxation if *Tyler Pipe* was applied retroactively[.]" Pet. 6. In describing the earlier 1985 conditional credit amendments to RCW 82.04.440(4), 1985 Wash. Laws, ch.

190, § 1, Digital states that the Washington Legislature "did not provide for these credits to be substituted for [full] refunds as the sole remedy for any illegal taxation found to have been conducted under the multiple activities scheme." Pet. 6. However, the 1985 conditional credit amendments contained language that was virtually identical to the language in section 3 of the 1987 credit law quoted by Digital. As amended in 1985, RCW 82.04.440(4)(a) read:

> If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that subsection (2) of this section results in an unconstitutional discrimination against interstate or foreign commerce, and that relief is appropriate *for any tax reporting periods either before or after the effective date of this 1985 act* [April 30, 1985], it is the intent of the legislature that the credit provided in (b) of this subsection shall be applied to such reporting periods *and that relief for such periods be limited to the granting of such credit*. It is further the intent of the legislature that such credit shall be applicable only under the conditions and to the extent provided in this subsection (4).

Pet. App. 54a (italics added).

Thus, the crucial first proposition of state law on which Digital's federal claim seems to rest--that until the 1987 two-way credit law was enacted on August 11, 1987, RCW 82.32.060 mandated "the retrospective remedy of a full refund" of all taxes declared unconstitutionally discriminatory in *Tyler Pipe*--is false.

For similar reasons, the second proposition supporting Digital's federal claim also is largely false or misleading. While it is literally true that the Washington Legislature passed the 1987 two-way credit law seven weeks "after *Tyler Pipe*," the Legislature neither substituted the two-way credit for any "usual refund remedy" nor passed the two-way credit law "for the express purpose of depriving taxpayers of their preexisting refund remedy." First, as explained above, there has never been any "usual remedy" under Washington law when a provision in a tax statute is held to be unconstitutionally

discriminatory.[9] Second, in this particular instance, the "preexisting refund remedy" under Washington law for which the 1987 two-way credit was substituted was the 1985 one-way credit, not a full refund remedy. *See* Pet. App. 53a-58a. Third, the "express purpose[s]" of the 1987 two-way credit law were to "achieve constitutional equality between Washington taxpayers who have conducted and will continue to conduct business in interstate and intrastate commerce," to "preserve the integrity of Washington's business and occupation tax system and impose only that financial burden upon the state necessary to establish parity in taxation between such taxpayers," to "provide equality of treatment of taxpayers engaging in extracting, manufacturing or selling regardless of the location in which any of such activities occurs," and to "eliminate unconstitutional discrimination between taxpayers and ensure the preservation and collection of revenues from the conduct of the multiple activities in which taxpayers in this state may engage." Pet. App. 55a. As the Washington Supreme Court stated in *American Nat'l Can*, 114 Wash. 2d at 247-48, "[t]hese motives are proper."

Also false is the third proposition of federal law on which Digital's federal claim is based: that *Reich v. Collins*, 513 U.S. 106 (1994), and *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745 (1995), prevent a State found to have imposed an impermissibly discriminatory tax in violation of the Commerce Clause from retroactively reformulating the tax in a manner consistent with the Commerce Clause and, having done so, retaining any taxes appropriately levied upon interstate taxpayers pursuant to that reformulated tax.

Although it argued otherwise in the courts below, Digital does not dispute in its petition that retroactive application of the 1987

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[9]Indeed, to the extent that Washington statutory law suggested any "usual remedy" for an invalid tax exemption such as the former multiple activities exemption, that remedy would have been to strike the exemption only rather than to strike the tax. *See* RCW 82.98.030; *Associated Grocers, Inc. v. State*, 114 Wash. 2d 182, 188-190, 787 P.2d 22 (1990), *cert. denied*, 498 U.S. 1023 (1991).

credit statute to the interim period is "meaningful backward-looking relief" as described in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). According to Digital, "[i]n providing such relief, a state must either award full refunds to those burdened by an unlawful tax or issue some other order that 'create[s] in hindsight a nondiscriminatory scheme.'" Pet. 22 (quoting *McKesson*, 496 U.S. at 40).[10] In *McKesson*, this Court held:

> [A] State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination. Florida may reformulate and enforce the Liquor Tax during the contested tax period *in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause*. Having done so, *the State may retain the tax appropriately levied upon petitioner pursuant to this reformulated scheme* because this retention would deprive petitioner of its property pursuant to a tax scheme *that is valid under the Commerce Clause*. In the end, the State's postdeprivation procedure would provide petitioner with all of the process it is due: an opportunity to contest the validity of the tax and a "clear and certain remedy" designed to render the opportunity meaningful *by preventing any permanent unlawful deprivation of property*.

496 U.S. at 39-40 (some italics added.) *See also id.* at 44 n.27. More recently, in *Associated Industries v. Lohman*, 114 S. Ct. 1815 (1994), after concluding that Missouri's uniform statewide use tax scheme unconstitutionally discriminated against interstate commerce in those Missouri localities where the rate of the use tax exceeded the rate of the local sales tax, this Court reiterated:

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[10]In *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), this Court quoted from the same sentence in *McKesson*, stating that in providing "meaningful backward-looking relief," a state "may either award full refunds to those burdened by an unlawful tax or issue some other order that 'create[s] in hindsight a nondiscriminatory scheme.'" 509 U.S. at 101 (quoting *McKesson*, 496 U.S. at 40).

> [T]he Due Process Clause would demand only that, "to cure the illegality of the tax as originally imposed, the State must ultimately collect a tax for the contested tax period that in no respect impermissibly discriminates against interstate commerce."

Id. at 1825 (quoting *McKesson*, 496 U.S. at 44 n.27).[11]

Retroactive application of the 1987 two-way credit law to the interim period provides Digital all the relief due process requires. The State of Washington may retain any taxes for the interim period appropriately levied upon Digital under the retroactively applied 1987 credit law because such retention lawfully deprives Digital of its property "pursuant to a tax scheme that is valid under the Commerce Clause." Retroactive application of the 1987 two-way credit law thus provides Digital "with all of the process it is due". *McKesson*, 496 U.S. at 40.

Digital's apparent assertion that *Reich v. Collins*, 513 U.S. 106 (1994), overruled this *McKesson* line of cases is misguided. *See* Pet. 22-23. In *Reich*, the Georgia Supreme Court adopted an implausible, unprecedented interpretation of the broadly worded Georgia statute authorizing a taxpayer to claim a refund of "any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him," construing the statute not to apply to "the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid." 513 U.S. at 109. Therefore,

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[11] *See also American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 182-83 (1990)(plurality opinion)("Presumably, under *McKesson*, [Arkansas] would be required to calculate and refund that portion of the tax that would be found under *Scheiner* to discriminate against interstate commerce," or "attempt to provide relief by retroactively increasing taxes on the favored taxpayers to cure any violation."); *id.* at 206 n.2 (1990)(Stevens, J., dissenting)(*McKesson* "ma[de] clear" that the Constitution did not require Arkansas to refund "the entire tax that was unconstitutionally exacted," but only to refund "the discriminatory portion" or "otherwise adjust the tax to render it nondiscriminatory.").

the Georgia court dismissed Reich's refund action, refusing to address the merits of Reich's refund claims. *Id.* at 110.

This Court reversed, holding that the Due Process Clause did not permit Georgia to hold out a "clear and certain" postdeprivation *procedural* remedy in the form of a refund action and then, after the taxpayer had paid disputed taxes, to declare that no such *procedural* remedy ever existed. *Id.* at 111. This Court characterized the Georgia Supreme Court's refusal to adjudicate Reich's refund claim as a "'bait and switch,' as some have described it." *Id.*[12] This Court, however, did *not* determine whether the taxpayer was entitled to a refund of the contested taxes, instead merely remanding the case for the Georgia courts to provide "meaningful backward-looking relief" consistent with "due process and our *McKesson* line of cases." *Id.* at 114.

Here, in contrast to the situation in *Reich*, when Digital paid the taxes in question *and at all times thereafter*, Washington law offered Digital a choice of *either* (1) a predeprivation procedural remedy in the form of an action for an injunction under RCW 82.32.150 or an action for a declaratory judgment under RCW 7.24 *or* (2) a postdeprivation procedural remedy in the form of an action for a refund of taxes under RCW 82.32.180.[13] Thus, Digital had

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[12]This Court stated: "In our view, the average taxpayer reading [the statute's] language would think it obvious that state taxes assessed in violation of federal law are 'illegally assessed' taxes." *Id.* Moreover, this Court found it "especially unfair to penalize taxpayers who may have ignored the possibility of pursuing predeprivation remedies out of respect for [the State's preference that taxpayers pursue only postdeprivation remedies]." *Id.* at 112.

[13]Digital erroneously argues that when it "paid the taxes at issue, Washington provided only the postdeprivation remedy of a refund for unlawfully exacted taxes" and that "[u]nder Washington law, a court may provide relief from illegal taxation only after the disputed taxes have been paid." Pet. 7.

To the contrary, Washington law does not require prepayment of taxes as a prerequisite to filing suit when the taxpayer contests an assessment on constitutional grounds. *See Shutt v. Moore*, 26 Wash. App. 450, 456 n.4, 613 P.2d 1188 (1980). The last sentence of RCW 82.32.150 plainly permits a taxpayer to seek a restraining order or injunction to enjoin the collection of taxes

adequate predeprivation *and* postdeprivation procedural remedies in the Washington courts to challenge the constitutionality of the former multiple activities exemption in RCW 82.04.440.[14]

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on state or federal constitutional grounds. Relying on that statute, Washington trial or appellate courts often have issued preliminary or permanent injunctions in actions challenging the constitutionality of Washington excise taxes. *See, e.g., Bond v. Burrows*, 103 Wash. 2d 153, 690 P.2d 1168 (1984); *General Motors Corp. v. State*, 60 Wash. 2d 862, 871, 376 P.2d 843 (1962); *B. F. Goodrich Co. v. State*, 38 Wash. 2d 663, 231 P.2d 325 (1951); *Pacific Tel. & Tel. Co. v. State Tax Comm'n*, 180 Wash. 673, 42 P.2d 420 (1935).

The Washington Supreme Court also has interpreted the Uniform Declaratory Judgments Act, RCW 7.24, as permitting Washington courts to issue declaratory judgments concerning the constitutionality of state excise taxes. *See, e.g., Bond v. Burrows, supra*; *Texas Co. v. Cohn*, 8 Wash. 2d 360, 366, 112 P.2d 522 (1941); *Great Northern Ry. v. Cohn*, 3 Wash. 2d 672, 675, 101 P.2d 985 (1940).

Moreover, RCW 82.32.190 authorizes the Department of Revenue to stay the collection of tax "from any taxpayer or group of taxpayers when a question bearing on their liability for tax" is "pending in the courts[.]"

[14]Although acknowledging that RCW 82.32.150 "provides for the possibility of injunctions" in tax cases, Digital inaccurately contends that "the Supreme Court of Washington has held such an injunction generally will not issue because Washington 'provides the legal remedy of a refund suit,'" citing *Tyler Pipe Indus., Inc. v. Department of Rev.*, 96 Wash. 2d 785, 638 P.2d 1213, 1216 (1982). Pet. 7 n.8.

In *Tyler Pipe*, the Washington Supreme Court did *not* hold that an adequate remedy at law in the form of a refund action under RCW 82.32.180 bars equitable relief under RCW 82.32.150 in state or federal constitutional challenges. The Court held exactly to the contrary. It determined that it "need not decide" whether a refund action under RCW 82.32.180 "is an adequate legal remedy barring equitable relief" because the Washington Legislature "by excepting constitutional cases from the anti-injunction provision [in RCW 82.32.150] *chose not to limit the court's equitable powers* in those cases *even though the legal remedy may, in fact, be adequate*." 96 Wash. 2d at 791 (italics added).

The taxpayer in *Tyler Pipe* obtained a preliminary injunction from the Thurston County Superior Court based in part on the court's conclusion that "a substantial constitutional question not definitively resolved by prior authorities" was presented by the taxpayer. 96 Wash. 2d at 787. The "substantial constitutional question" the taxpayer presented was a "nexus" claim based on the Commerce Clause and the Due Process Clause. 96 Wn.2d at 793-94. (The

Digital chose to pursue a postdeprivation refund action and the Washington courts have honored that choice. The Washington courts have adjudicated Digital's refund claims *on the merits*, correctly rejecting Digital's arguments that it is entitled to a full refund of all the wholesaling and retailing B&O taxes it paid during the interim period. That is all the "process" that Digital is "due" in this situation. There has been no "bait and switch" whereby Digital was induced to pay its taxes in expectation of a postdeprivation refund procedural remedy, only to lose that remedy because the refund procedure was replaced by an exclusive predeprivation remedy of which it could not then avail itself.

The issue before this Court in *Reich* had nothing to do with what forms of "backward-looking relief" will satisfy the Due Process Clause when a tax statute is held to be unconstitutional. *Reich* does not require the Washington courts to treat the wholesaling and retailing B&O taxes paid by Digital for all tax periods before August 12, 1987, as if those taxes were absolutely void and unenforceable.

Digital's apparent assertion that *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745 (1995), overruled the *McKesson* line of cases is equally untenable. *See* Pet. 23. The passage from *Reynoldsville* selectively quoted by Digital addresses a separate issue also briefly discussed in *McKesson*: the freedom of states to impose various procedural requirements on actions for postdeprivation relief, such as payment under protest, other timely notice requirements, or short statutes of limitations. *See McKesson*, 496 U.S. at 45. No such issue--which is unrelated to what forms of "backward-looking relief"

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taxpayer had not yet asserted any "discrimination" claim.) The Washington Supreme Court reversed the superior court's preliminary injunction order because the Washington Supreme Court concluded that the taxpayer had not shown a likelihood of success on the merits of its "nexus" claim. *Id.* The Washington Supreme Court's conclusion was correct because this Court, five years later, unanimously agreed that the taxpayer had sufficient "nexus" with the State of Washington to support the State's imposition of the wholesaling B&O tax. *Tyler Pipe Indus., Inc. v. Washington Dep't of Rev.*, 483 U.S. 232, 248-51 (1987); *id.* at 254 (Scalia, J., concurring in part and dissenting in part).

will satisfy the Due Process Clause when a tax statute is held to be unconstitutional--is present in this case.

The only passage in *Reynoldsville* that relates to the question presented in this case appears earlier in the opinion:

> The Court has suggested that some [tax cases] involve a particular kind of constitutional violation--a kind that *the State could cure without repaying back taxes*. Where the violation depends, in critical part, upon differential treatment of two similar classes of individuals, then one might cure the problem either by similarly burdening, or by similarly unburdening, both groups. Where the violation stemmed from, say, taxing the retirement funds of one group (retired Federal Government employees) but not those of another (retired state government employees), then the State might cure the problem either (1) by taxing both (imposing, say, back taxes on the previously advantaged group, to the extent constitutionally permissible), or (2) by taxing neither (and refunding back taxes). And, if the State chooses the first, *then the taxpayers need receive no refund*. But, that result flows not from some general "remedial" exception to "retroactivity" law, *but simply from the fact that the state law that the taxpayer had attacked now satisfies the Constitution*.

115 S. Ct. at 1750 (citations omitted; italics added). Thus, far from overruling *McKesson*, as Digital is forced to argue, *Reynoldsville* is but another case in the *McKesson* line that squarely reject Digital's procedural due process claim.

In summary, Digital's procedural due process challenge to the Washington Supreme Court's retroactive application of the 1987 two-way credit law to the interim period has absolutely no merit.

The pre-Tyler Pipe *tax period.* The same analysis also disposes of Digital's federal claim for the other contested tax period from January 1, 1983 through June 22, 1987, as the three-judge lead opinion below demonstrates. *See* Pet. App. 17a. Digital's contention that the Due Process Clause prohibits retroactive application of the 1987 two-way credit law to this earlier tax period has no more merit

than its similar contention regarding the interim period. Thus, this case does not warrant review by this Court and the petition should be denied.

If this Court were to grant the petition to consider Digital's claim, however, the Court probably would have to address several preliminary issues concerning this earlier pre-*Tyler Pipe* tax period before reaching the question Digital presents. As respondent, the Department may defend the judgment dismissing Digital's refund claim for this pre-*Tyler Pipe* tax period on any ground properly raised below, whether the ground was accepted or rejected by the courts below. *See Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977). As shown by the trial court's decision and the "concurring" and "dissenting" opinions below, Digital obviously is entitled to no "backward-looking relief" under the Due Process Clause unless the wholesaling and retailing B&O taxes it paid for this pre-*Tyler Pipe* period impermissibly discriminated against interstate commerce.

Therefore, if Digital's petition were granted, the Department would defend the judgment below by requesting this Court to decide the following federal question:

> Whether this Court's Commerce Clause discrimination holding in *Tyler Pipe* invalidates Washington B&O taxes paid for tax periods before the *Tyler Pipe* decision, when on remand from this Court's judgments in *Tyler Pipe*, the Washington Supreme Court in *National Can II* applied this Court's discrimination holding purely prospectively and this Court dismissed the taxpayers' appeals from the decision of the Washington Supreme Court.

This general question encompasses several subsidiary issues, including those raised by Justice Souter's opinion in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), and by Justice O'Connor's and Justice Scalia's opinions in *American Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990).

There is no reason why this Court should be forced to struggle with those difficult issues involving this Court's federal

retroactivity doctrine in a case such as this, where the judgment entered below is obviously correct and where the petitioner's question presented is devoid of merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 12, 1997

Superior Court of the State of Washington
For Thurston County

November 7, 1994

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Mr. Donald F. Cofer
Assistant Attorney General
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Re: *Digital Equipment Corporation v. State of Washington, Department of Revenue*
Thurston County Cause No. 87-2-01627-4

Dear Counsel:

I have reviewed the arguments advanced for reconsidering my earlier decision. I conclude that those arguments were considered by me in making my original determination. Nothing argued on the motion for reconsideration has convinced me to change my decision. The motion for reconsideration is denied.

I grant summary judgment in favor of the Department for the assessment period from June 23 to August 11, 1987. The 1987 credit law cured the constitutional infirmity in the 1985 law. It was intended by the legislature to be retroactive to June

23, 1987 under conditions that apply to this controversy. 1987 Credit Law, Ch. 3, section 3. The law should be applied retroactively here. *American National Can v. Department of Revenue*, 114 Wn.2d 236, 250, 787 P.2d 545 (1990). *McKesson Corporation v. Florida*, 496 U.S. 18, 110 S.Ct. 2238 (1990) permits this result, the consequence of which is that there is no relative economic disadvantage to the plaintiff.

The department is the prevailing party. Mr. Cofer should prepare and submit a summary judgment of dismissal. The order should identify all of the materials submitted to me for my consideration. The order or judgment should not contain findings or conclusions.

Very truly yours,

/s/ Wm. Thomas McPhee
Wm. Thomas McPhee
Judge

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

DIGITAL EQUIPMENT CORPORATION,	)	
Plaintiff,	)	NO. 87-2-01627-4
v.	)	DECLARATION OF R. S. KURASKA IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,	)	
Defendant.	)	

I, R. S. KURASKA, under penalty of perjury, declare the following to be true and correct.

1. I am the manager of Federal and State Income Tax Audits for Digital Equipment Corporation ("Digital"). I have held this position with Digital for 10 years, and have been employed by Digital for a total of 10 years. I am a Tax Professional with 35 years experience covering all phases of Federal, State, and International Taxation which includes compliance and audits. I have been in managerial positions for approximately 30 years and have been employed by various multinational corporations. My educational background consists of a BBA undergraduate degree in accounting, Juris Doctorate graduate degree in law and a Certificate of Completion from the University of Toronto regarding Canadian taxation. Prior to the position I currently occupy with Digital, I was Director of Taxes -First National Supermarkets. I make this declaration based on my personal knowledge, am over the age of 18 years and competent to testify to the matters stated in this declaration.

2. Digital is a corporation organized and existing under the laws of the Commonwealth of Massachusetts. It was founded in 1957 and has worldwide operations in the United States and in more than 40 other countries.

3. Digital designs, manufactures, sells and services computers and associated peripheral equipment, and related software and supplies. Digital's products are used worldwide in a wide variety of applications and programs, including scientific research, computation, communications, education, data analysis, industrial control, time-sharing, commercial data processing, graphic arts, word processing, office automation, health care, instrumentation, engineering and simulation. Most of Digital's products are of its own design and are sold under its own name. Digital's marketing objective is to provide to customers a wide variety of computational resources, including the central processing units, memories, terminals, communications options, software, and field engineering, training and software support services.

4. During the years in question, Digital manufactured all parts, components and products outside the state of Washington. Because of the difficulty in listing all the specific products manufactured by Digital outside the state of Washington and sold by Digital to its Washington customers during the years in question, I have attached to this declaration as Attachment A, Digital's 1984 Form 10-K report to the Securities and Exchange Commission. The report describes the products manufactured and sold to Washington customers during the applicable years.

5. In Washington, Digital made sales to end-users (consumers) as well as to persons who resold the goods (wholesalers). It paid both "wholesaling" (RCW 82.04.270) and "retailing" (RCW 82.04.250) B&O taxes to the state of Washington during the years in question.

6. Digital is seeking a refund of the Washington B&O taxes imposed by RCW 82.04.250 (retailing) and 82.04.270 (wholesaling) which were paid on sales of products manufactured by Digital outside Washington and sold by Digital to customers in Washington between January 1, 1983 and August 11, 1987.

7. The total amount of B&O taxes paid by Digital to the state of Washington on sales of goods manufactured outside the state during the period January 1, 1983 through August 11, 1987, was $1,706,877 (however, see paragraph 10 below).

8. The total amount of B&O taxes paid by Digital to the state of Washington on sales of goods manufactured outside the state during the period January 1, 1983 through June 23, 1987, was $1,646,437 (however, see paragraph 10 below).

9. Digital did not pay any qualifying extracting or manufacturing gross receipts taxes to any other jurisdictions outside Washington, including other state or local governments, the District of Columbia or foreign countries, on any of the products which were manufactured outside the state of Washington and sold to Washington customers during the time periods noted above.

10. The facts set forth in paragraphs 7 and 8 above have not been audited or verified by the Washington State Department of Revenue. If the court rules that Digital is entitled to a refund of some or all of the B&O taxes paid during the years in question, I acknowledge on behalf of Digital that the Department of Revenue has the right to audit and/or verify the facts and amounts set forth above.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6th day of April, 1994, at Maynard,

Massachusetts.

/s/ R. S. Kuraska
R. S. Kuraska

REVISED CODE OF WASHINGTON (RCW)

7.24.010 Authority of courts to render. Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. [1937 c 14 § 1; 1935 c 113 § 1; RRS § 784-1.]

7.24.020 Rights and status under written instruments, statutes, ordinances. A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. [1935 c 113 § 2; RRS § 784-2.]

. . . .

7.24.050 General powers not restricted by express enumeration. The enumeration in RCW 7.24.020 and 7.24.030 does not limit or restrict the exercise of the general powers conferred in RCW 7.24.010, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty. [1985 c 9 § 2. Prior: 1984 c 149 § 3; 1935 c 113 § 5; RRS § 784-5.]

. . . .

7.24.070 Review. All orders, judgments and decrees

under this chapter may be reviewed as other orders, judgments and decrees. [1935 c 113 § 7; RRS 784-7.]

7.24.080 Further relief. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. When the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith. [1935 c 113 § 8; RRS § 784-8.]

. . . .

7.24.110 Parties--City as party--Attorney general to be served, when. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard. [1935 c 113 § 11; RRS 784-11.]

. . . .

82.32.190 Stay of collection pending suit. The department, by its order, may hold in abeyance the collection of tax from any taxpayer or group of taxpayers when a question bearing on their liability for tax hereunder is pending in the courts: PROVIDED, That the department may impose such conditions as may be deemed just and equitable and shall require

the payment of interest at the rate of three-quarters of one percent of the amount of the tax for each thirty days or portion thereof from the date upon which such tax became due. [1971 ex.s. c 299 § 21; 1965 ex.s. c 141 § 6; 1961 c 15 § 82.32.190. Prior: 1937 c 227 § 19; 1935 c 180 § 200; RRS § 8370-200.]

. . . .

82.98.030 Invalidity of part of title not to affect remainder. If any chapter, section, subdivision of a section, paragraph, sentence, clause or word of this title for any reason shall be adjudged invalid, such judgment shall not affect, impair or invalidate the remainder of this title but shall be confined in its operation to the chapter, section, subdivision of a section, paragraph, sentence, clause or word of the title directly involved in the controversy in which such judgment shall have been rendered. If any tax imposed under this title shall be adjudged invalid as to any person, corporation, association or class of persons, corporations or associations included within the scope of the general language of this title such invalidity shall not affect the liability of any person, corporation, association or class of persons, corporations or associations as to which such tax has not been adjudged invalid. It is hereby expressly declared that had any chapter, section, subdivision of a section, paragraph, sentence, clause, word or any person, corporation, association or class of persons, corporations or associations as to which this title is declared invalid been eliminated from the title at the time the same was considered the title would have nevertheless been enacted with such portions eliminated. This section shall not apply to chapter 82.44 RCW. [1961 c 15 § 82.98.030.]

WASHINGTON COURT RULES

RULES OF APPELLATE PROCEDURE

RULE 9.12 SPECIAL RULE FOR ORDER ON SUMMARY JUDGMENT

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

[Adopted effective September 1, 1985; September 1, 1990.]

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

DIGITAL EQUIPMENT CORPORATION,	)	
	)	NO. 87-2-01627-4
Plaintiff,	)	
v.	)	MEMORANDUM IN SUPPORT OF
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,	)	PLAINTIFF DIGITAL EQUIPMENT CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT
Defendant.	)	

. . . .

VI. AUTHORITIES AND ARGUMENT

A. Federal Law Requires Retroactive Refunds of State Taxes Found To Be Unconstitutionally Imposed.

1. Summary of The Federal Cases Dealing With Retroactivity Issues After Tyler Pipe.

. . . .

Next, in McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 110 L. Ed. 2d 17, 110 S. Ct. 2238 (1990) (Exhibit J) the United States Supreme Court held that, where the taxing state requires a taxpayer to pay a tax first and later obtain review of the validity of the tax in a refund

action, the Due Process Clause of the United States Constitution requires the State to afford the taxpayer meaningful postpayment relief for the taxes previously paid if the tax is ultimately held unconstitutional. This means that a taxpayer who is required to pay a tax that is later found to violate the Commerce Clause, as was the case in Tyler Pipe, must be afforded meaningful retroactive relief.[4]

. . . .

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[4]Washington law also requires a taxpayer to first pay a contested tax and then seek a refund in Superior Court. See RCW 82.32.180. There is an exception to this rule, found in RCW 82.32.150 (sometimes known as the anti-injunction statute), which provides that no restraining order or injunction shall be granted or issued to restrain or enjoin the collection of any tax except when the assessment is made in violation of the State or Federal Constitutions. In the predecessor case to the United States Supreme Court's decision in Tyler Pipe, the Washington Supreme Court held that a taxpayer seeking an injunction in a constitutional case must also meet the equitable criterion governing an injunction's issuance. Tyler Pipe Industries v. Department of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982). This is so because:

> The rule in this state is that injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law. [Citations omitted.]
>
> The statutory scheme at issue provides the legal remedy of a refund suit; and if successful in that suit, a taxpayer may recover interest at 3 percent. RCW 82.32.060; 82.32.150; 82.32.180.

B. Digital Is Entitled To A Refund Of B&O Taxes Declared Unconstitutional In Tyler Pipe.

The taxpayers who successfully challenged Washington's B&O tax in Tyler Pipe failed to recover refunds in National Can only because the Washington Supreme Court denied retroactive application of Tyler Pipe based on Chevron. In Beam and Harper, the United States Supreme Court clearly rejected Chevron and mandated that retroactive refunds must be made in cases where the Court has declared a state tax unconstitutional. Indeed, Beam and Harper establish three things: (1) retroactive application of a decision is the normal practice; (2) unless a United States Supreme Court decision specifically reserves the issue of retroactivity, lower courts must interpret the decision as having retroactive effect; and (3) because prospective application of a decision would give retroactive benefit to no one, any discussion of remedies in a United States Supreme Court decision must be interpreted as acknowledgement that the decision has retroactive effect for everyone.

. . . .

Thus, Tyler Pipe was denied an injunction against the collection of the B&O tax at issue because, if successful, it would receive a refund. The case later went to the United States Supreme Court on the merits, Tyler Pipe, supra, and Tyler Pipe's challenge to the tax was upheld. However, Tyler Pipe was ultimately denied a retroactive refund by the ruling in National Can, supra.

The Washington Supreme Court has even recognized the United States Supreme Court's analysis and holdings in Beam and Harper. In a recent decision, Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992) (Exhibit M), the Washington Supreme Court acknowledged that "the United States Supreme Court has recently limited the Chevron Oil Co. v. Huson, supra, rule regarding retroactive application in the case of James B. Beam Distilling Co. v. Georgia, [citations omitted]." Robinson at 73.

Thus, the federal law on retroactivity is as announced by the United States Supreme Court in Beam and Harper. In Robinson, the Washington Supreme Court recognized this new federal rule of retroactivity as the current state of the law in this state as well.

C. The National Can and American National Can Cases Are Not Controlling.

1. National Can.

The Washington Supreme Court in Robinson recognized that the Chevron test relied on in National Can, is no longer valid. The court specifically found:

> While our decision in National Can relied in part on the Chevron Oil analysis, we now modify our rule from National Can in a manner consistent with the limitations on the Chevron Oil rule effected in Beam Distilling.

Robinson, supra at 77. It follows that the ruling denying retroactive B&O tax refunds in National Can is not authority for denying such refunds to Digital. Again, as the United States Supreme Court explained in Harper: "[T]he legal imperative 'to apply a rule of federal law retroactively after the case

announcing the rule has already done so' must 'prevai[l] over any claim based on a Chevron Oil analysis,'" Harper, 125 L. Ed. 2d at 87. In the wake of Beam and Harper, the Due Process Clause of the United States Constitution requires retroactive relief for Washington taxpayers "whose cases are still open on direct review." Id., at 86. Digital's case, still pending in Thurston County Superior Court, is one of those "cases . . . still open on direct review". Id.

In short, the recent United States Supreme Court decisions in Beam and Harper have made the Washington Supreme Court's prior non-retroactivity ruling in National Can obsolete. Since Digital's case is a matter "still open on direct review", Digital is entitled to a refund of B&O taxes paid prior to the enactment of the 1987 credit law.

2. American National Can.

The Washington Supreme Court's decision in American National Can is likewise not controlling. The court in American National Can held that the 1987 and 1985 credit or exemption laws were to be read together to remedy the constitutional deficiencies found in Tyler Pipe. Citing section 3 of the 1987 credit law, the court found the legislature had intended to retroactively apply the act's credit scheme in the event a court determined relief was appropriate for any periods prior to the act's effective date. American National Can, supra, at 250. The court went on to hold that Tyler required some relief to taxpayers for the interim period[7] but limited the relief to the credits provided under the 1985 and 1987 credit laws.

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[7]The six weeks between the date of the Supreme Court's Tyler Pipe decision, June 23, 1987, and the date the legislature amended RCW 82.04.440, August 11, 1987.

The taxpayers in American National Can, however, did not raise the Supremacy Clause arguments upon which the United States Supreme Court decided Harper. Nor did the taxpayers challenge the interpretation of RCW 82.04.440 or the Department's selection of manufacturing and extracting taxes for credits. Instead, the taxpayers sought to invalidate the 1987 credit law as a violation of the Commerce Clause arguing that the state's failure to grant credits for income taxes or excise taxes paid in other states constituted discrimination against interstate businesses. The taxpayers further argued that the state's failure to give them refunds violated due process and equal protection guarantees.[8]

Digital does not challenge the Washington Supreme Court's decision that the 1987 credit law remedied the defects found by the United States Supreme Court in Tyler Pipe after August 11, 1987. Digital does, however, challenge the Washington Supreme Court's decision that the taxpayers in American National Can were only entitled to the credits provided by the 1987 credit law, and not full refunds. The United States Supreme Court's rulings in Beam and Harper cast serious doubt on the validity of this Washington Supreme Court retroactivity analysis and holding that taxpayers were not entitled to full refunds for the interim period after Tyler Pipe. In fact, the

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[8]In the American National Can case, taxpayers also challenged the retroactive application of the credits on separation of powers grounds. The Washington Supreme Court summarily dismissed this argument stating, "(S)tate law governs the relationship between the Washington legislature and its courts. Accordingly, our discussion rests entirely upon our independent opinion of the requirements of the Washington State Constitution. . . . Federal law does not compel the results reached in this case." American National Can, at 252.

Washington Supreme Court, in the course of its analysis, actually established the deficiency of the credit as a remedy under Beam and Harper.

In analyzing the credit allowed under the 1987 credit law, the Washington Supreme Court specifically found that the $1,304,000 worth of credits applied for by taxpayers under the 1987 credit law was a "small fraction" of the total taxes actually collected. The court dismissed the inequality, however, by stating that the fact businesses had applied for $1,304,000 in credits ". . . proved beyond a shadow of a doubt that the new law had a practical effect". American National Can, supra, at 247-248. The court thus dismissed the taxpayers' argument as merely a complaint about the magnitude of the credits' effect.

However, the court's acknowledgement of the disparity between the amount of taxes actually collected and the amount of credits retroactively given becomes additional evidence of Digital's right to a full refund today. Obviously, this analysis shows that the Washington Supreme Court failed to envision the United States Supreme Court's subsequent decision in Harper, which imposes the requirement that full retroactive effect must be given to new federal rulings, like the one made in Tyler Pipe.

D. The State's Attempt To Make The 1987 Credit Law Retroactive Is Invalid.

Notwithstanding Beam and Harper, it is Digital's understanding that the Department will argue that the legislature's 1987 amendments to RCW 82.04.440 provided a remedy to taxpayers in the form of credits which were consistent with Tyler Pipe, and that the legislature could, as a matter of state law, make the remedy applicable retroactively. However, this argument does not fully appreciate the requirements now imposed on states by the United States Supreme Court in Beam

and Harper.

First, the United States Supreme Court invalidated Washington's multiple activities statute, RCW 82.04.440, in Tyler Pipe. Subsequently, the Court held in Beam and Harper that when it applies a rule of federal law, that rule must be given full retroactive effect to all cases open on direct review.

Second, while the United States Supreme Court in Harper refused to enter a judgment for the taxpayers, indicating that federal law did not necessarily entitle them to a refund, the Court specifically stated that the Supremacy Clause does not allow a state to supplant the federal retroactivity doctrine through state law. Rather, the Supreme Court held that the Constitution required the state, in this case Virginia, to fashion the appropriate remedy for taxpayers. The Court then set forth the standards for determining the constitutional sufficiency of any remedy to be adopted by Virginia.

The United States Supreme Court held that the constitutionally sufficient remedy turned initially on an assessment of whether taxpayers had been offered a meaningful opportunity to withhold the contested tax assessments and to challenge the validity of the assessments in a predeprivation hearing.[9] If no such predeprivation remedy existed, as in the state of Washington (Id.), the Due Process Clause of the Fourteenth Amendment obligated the state to provide meaningful backward looking relief to rectify any unconstitutional deprivation. McKesson, 496 U.S. 18, 39-40. In providing such relief, the state could either award full refunds to those burdened by an unlawful tax, or issue some other order creating "in

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[9]See fn. 4, supra.

hindsight a nondiscriminatory scheme". Harper, 125 L. Ed. 2d, at 89 citing McKesson, supra, and Davis, 489 U.S. at 818. Finally, the Court cautioned that although a state law could provide relief beyond the demands of federal due process, under no circumstances could a state law confine taxpayers to a lesser remedy. Harper, 125 L. Ed. 2d, at 89.

In this case, there is no question that the United States Supreme Court in Tyler Pipe found that Washington's multiple activities exemption statute discriminated against interstate commerce. There is also no question that the Washington Supreme Court in National Can and American National Can refused to provide taxpayers with full refunds of the unconstitutionally assessed B&O taxes at issue here, based on the now-erroneous retroactive application of the 1987 credit law. (This remedy is no longer tenable under the federal retroactivity law established by Beam and Harper.) And finally, there is no question that the Washington Supreme Court found the 1987 credit law provided taxpayers a credit representing only a small fraction of the total taxes collected under the previous unconstitutional provision.[10]

To comply with Harper, the state must either (1) award full refunds to those burdened by an unlawful tax or (2) issue some other order that creates, in hindsight, a non-discriminatory scheme. Harper, 125 L. Ed. 2d at 89. To comply with Harper, the remedies adopted by the state must be substantially equivalent. Since the retroactive application of the 1987 credit law provides for a significantly lesser credit rather than a full

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[10]In fact, Digital has received no credits. See Declaration of R.S. Kuraska, ¶ 9.

refund to affected taxpayers, the state has not complied with either of the rules set forth in Harper. Additionally, Harper clearly requires a "full refund" so that even if a credit is determined to be the same as a refund, the credit provided is not the equivalent of what taxpayers would have received with full refunds. This was even conceded by the Washington Supreme Court in American National Can.

Nor has Washington complied with the second option by creating in hindsight a non-discriminatory scheme. The fact that RCW 82.04.440 attempts to retroactively provide a credit for a small fraction of the taxes actually paid does not relieve the state of its obligation to create a non-discriminatory remedy. A non-discriminatory credit could only result if the credit was equal to the full amount of tax paid under the unconstitutional provision.

Consistent with Harper, the state of Washington could have fashioned a remedy that would have provided a credit equal to the amount of tax unconstitutionally paid, or set up a scheme under which the state could have retroactively imposed an equal assessment on intrastate manufacturers. It has not done either. In sum, state law cannot meet the demands of federal due process by confining interstate manufacturers, like Digital, to a lesser remedy.

E. Digital Is Entitled To A Refund of B&O Taxes Paid For All Periods Open Under The Statute of Limitations (RCW 82.32.060) Prior To The Date Of The Enactment Of The 1987 Credit Law.

Beam held that once the Supreme Court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res

judicata.[11] The applicable statute of limitations in the case of B&O tax refunds is RCW 82.32.060(1). It provides in pertinent part as follows:

> If, upon receipt of an application by a taxpayer for a refund . . . it is determined by the department that within the statutory period for assessment of taxes, penalties, or interest prescribed by RCW 82.32.050 any amount of tax, penalty, or interest has been paid in excess of that properly due, the excess amount paid within, or attributable to, such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at the taxpayer's option. Except as provided in subsections (2) and (3) of this section, no refund or credit shall be made for taxes, penalties, or interest paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

Here, Digital filed a petition for refund in Thurston County Superior Court in August, 1987. Under RCW 82.32.050, Digital is entitled to a refund of the B&O taxes paid in violation of the Commerce Clause of the United States Constitution from January 1, 1983 through August 11, 1987, the date prior to the effective date of the 1987 credit law.[12]

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[11]The doctrine of res judicata is not relevant because this case has been pending since 1987.

[12]The 1987 credit law was declared constitutional by the Washington Supreme Court in American National Can Corporation v. Department of Revenue, 114 Wn.2d 236, 787

VII. CONCLUSION

The recent United States Supreme Court decisions in Beam and Harper interpreting federal law entitle Digital to a refund of B&O taxes previously paid under Washington's former unconstitutional B&O tax scheme. This court should therefore grant Digital's motion for partial summary judgment and order the following:

1. A declaration that the United States Supreme Court's decision in Tyler Pipe is to be applied retroactively;

2. Consistent with Beam and Harper, Digital shall receive a refund of all selling B&O taxes invalidly paid to Digital from January 1, 1983 through August 11, 1987; and

3. An award of reasonable attorneys' fees under 42 U.S.C. §§ 1983 and 1988.

P.2d 545 (1990). The amended law was also applied retroactively to the interim period between the date of the United States Supreme Court's decision in Tyler Pipe (June 23, 1987) and the date the 1987 credit law became effective (August 11, 1987). As previously argued, Beam and Harper place into question this portion of the American National Can decision. Due to the short time frame of the interim period (six weeks), if this court should find that the 1987 credit law does relate back to the date Tyler Pipe was decided, then DEC's refund will cover the period January 1, 1983 through June 23, 1987. The Declaration of R.S. Kuraska sets forth the refund requested for this period. See ¶ 8.

RESPECTFULLY SUBMITTED this 11th day of April, 1994.

LANE POWELL SPEARS LUBERSKY

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SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

DIGITAL EQUIPMENT CORPORATION, Plaintiff, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Defendant.	)	NO. 87-2-01627-4 DIGITAL EQUIPMENT CORPORATION'S RESPONSE TO DEPARTMENT OF REVENUE MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Digital Equipment Corporation ("Digital") filed a motion for partial summary judgment under CR 56 against the Department of Revenue ("Department") on April 11, 1994. In its motion, Digital alleged that there were no genuine issues of material fact and, as a consequence, was entitled to partial summary judgment as a matter of law.

The Department subsequently filed a cross-motion for summary judgment on April 18, 1994, also alleging there were no genuine issues of material fact in the case and that it was entitled to a judgment as a matter of law.

Digital submits this memorandum in response to the Department's cross-motion for summary judgment.

. . . .

IV. ARGUMENT

. . . .

B. Digital's Remedy For The Unconstitutional Imposition of B&O Taxes Is A Full Refund Of Taxes Paid.

In its second argument, the Department contends that even if Tyler Pipe applied retroactively, federal law would not require the state of Washington to provide retroactive refunds to Digital because Digital failed to avail itself of pre-deprivation procedural remedies provided by Washington law. Digital's response to this argument first requires a review of the guidelines the states must follow on remedies provided by the U.S. Supreme Court in Harper.

Harper recognized that the question of remedy is, in the first instance, a question of state law. Nevertheless, under the guidelines set forth in Harper, a state must "provide relief consistent with federal due process principles." Harper, 113 S. Ct., at 2519, citing American Trucking Assns., Inc. v. Smith, 496 U.S. 167, 181, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990). Federal due process principles can be satisfied if: (1) the state provides a pre-deprivation process which "'offers a meaningful opportunity for taxpayers to withhold contested tax assessments *and* to challenge their validity in a predeprivation hearing'" (emphasis supplied); and, (2) if no such pre-deprivation remedy exists, a post-deprivation remedy which under "'the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.'" Harper, 113 S. Ct., at 2519, citing McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 39-40, 110 S. Ct. 2238, 2251-2252, 110 L. Ed. 2d 17 (1990). The State can meet this latter obligation

by either awarding "full refunds to those burdened by an unlawful tax or issue some other order that 'create[s] in hindsight a nondiscriminatory scheme'". Harper, 113 S. Ct., at 2520, citing McKesson, 110 S. Ct., at 2252. Finally, Harper cautioned that "State law may provide relief beyond the demands of federal due process, id., at 52, n. 36, 110 S. Ct., at 2258, n. 36, but under no circumstances may it confine petitioners to a lesser remedy, see id., at 44-51, 110 S. Ct., at 2254-2258." Harper, 113 S. Ct., at 2520.

. . . .

2. Post-deprivation Remedies

Since Washington law does not provide a meaningful opportunity for taxpayers to withhold contested tax assessments and challenge their validity in a pre-deprivation hearing, the state must provide meaningful backward-looking relief to rectify the unconstitutional deprivation found by the U.S. Supreme Court in Tyler Pipe. Harper, 113 S. Ct., at 2519. Federal due process requires this backward-looking relief to be either (1) an award of full refunds to those burdened by the unlawful tax or (2) some other relief creating in hindsight a non-discriminatory scheme. Id.

Under the federal due process requirements discussed in Harper, the state's most direct option is to provide Digital with a full refund of the B&O taxes unconstitutionally paid by Digital. If the state decides to order some other remedy, the state has some freedom in creating or selecting the "in hindsight, non-discriminatory scheme". The spectrum of options between a full refund and an "in hindsight, non-discriminatory scheme" are, however, limited by the requirements of federal due process. The U.S. Supreme Court in McKesson provided guidance to states required to fashion post-deprivation remedies for taxpayers

who pay assessments under unconstitutional tax schemes.

The issue in McKesson was whether Florida was required to provide a refund or any other form of relief for taxes previously paid under an unconstitutional discriminatory tax scheme. The Court held:

> Our precedents establish that if a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.

McKesson, 496 U.S., at 22, 110 S. Ct., at 2242.

The Court noted that if a state opted to provide post-deprivation remedies, the state must provide a "clear and certain remedy":

> Hence, the State's duty under the Due Process Clause to provide a "clear and certain remedy" requires it to ensure that the tax as actually imposed on petitioner and its competitors during the contested tax period does not deprive petitioner of tax moneys in a manner that discriminates against interstate commerce.

Id., 496 U.S., at 43, 110 S. Ct., at 2253.

The Court then responded to the equitable defenses raised by the state of Florida as justification for only providing

taxpayers prospective relief[11], by stating:

> A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to *future* cases. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such actions; refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other such that the state can predict with greater accuracy the availability of undisputed treasury funds. (Emphasis supplied.)

Id., 496 U.S., at 45, 110 S. Ct., at 2254-55.

Finally, the Court placed the burden on the states to protect themselves in the future by availing themselves of procedures akin to those suggested by the Court.

Harper, consistent with McKesson, also provides states several remedial options when faced with the retroactive

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[11]Florida argued that it had in good faith relied on a presumptively valid statute and that having to later give refunds when a statute is held unconstitutional undermined the state's ability to engage in sound fiscal planning.

application of a new rule of federal law.[12] In Digital's case, the state failed to avail itself of any pre-deprivation remedy which would satisfy the demands of due process. The state must now fashion a remedy which provides Digital a *full refund* of taxes paid, plus interest, or create an "in hindsight, nondiscriminatory remedial scheme". The principles of federal due process require the state's post-deprivation scheme or procedure to provide Digital a "clear and certain remedy" for the deprivation of the unconstitutionally assessed B&O taxes. Such a remedy cannot be no remedy.

. . . .

3. Digital Is Also Entitled To A Refund For The Tax Period June 23, 1987 Through August 11, 1987.

The Department contends that Digital is not entitled to a refund for the tax period between June 23, 1987, the date of the U.S. Supreme Court's decision in Tyler Pipe, and August 11, 1987, the date the legislature passed the 1987 credit law ("the interim period"). In support of its position, the Department cites the Washington Supreme Court's decision in

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[12]Both Harper and McKesson suggest remedies which would satisfy due process requirements. In accordance with these suggestions, the State of Washington could, for example, provide Digital with a full refund of B&O taxes collected. It could also, to the extent not barred by the statute of limitations, provide Digital a tax credit for the full amount of the refund owed plus interest against the imposition of future B&O taxes. Finally, it could retroactively extend the discriminatory tax exemption to in-state manufacturers or fashion any other remedy, so long as it met the constitutional requirements of Harper.

American National Can Corp. v. Department of Revenue, 114 Wn.2d 236, 787 P. 2d 545 (1990) which held that the legislature had intended to apply the 1987 credit law retroactively to the interim period in the event a court found relief was appropriate for any periods prior to the effective dates of the act. The Court thus found the taxpayers in American National Can were only entitled to the credits provided by the 1987 credit law during the interim period, not full refunds. In essence, the Department argues that the legislature could design a remedy to eliminate the constitutional defects of Tyler Pipe which could be applied retroactively. This argument, however, overlooks the remedial requirements of McKesson, Beam, and Harper.

First, the U.S. Supreme Court in Beam and Harper held that when the U. S. Supreme Court applies a rule of federal law, the rule *must* be given *full* retroactive effect. As discussed above, Tyler Pipe must therefore be applied retroactively to Digital and all other cases still open on direct review.

Second, the Court in Harper held that once the Court has determined a new rule of federal law must be given retroactive effect, taxpayers are entitled to a remedy which meets the requirements of federal due process of law. Again, federal due process requires the states to provide either a full refund or some other remedy which creates "in hindsight", a scheme which does not discriminate against interstate commerce.

The Washington Supreme Court did not have the benefit of the U. S. Supreme Court's decisions in Beam and Harper when it decided American National Can. The court's analysis in American National Can, therefore, went no further than to analyze whether the legislature intended the 1987 credit law to be applied retroactively to the interim period. The court also flatly refused to consider the constitutional issues raised by the taxpayers:

> The taxpayers have argued that interpreting the legislation to apply to this lawsuit raises constitutional difficulties. [Citation omitted.] We are not impressed with these difficulties.
>
> Taxpayers challenge the retroactive application of the credits on separation of powers grounds. State law governs the relationship between the Washington Legislature and its courts. Accordingly, our discussion rests entirely upon our independent opinion of the requirements of the Washington State Constitution . . . Federal law does not compel the results reached in this case.

American National Can, 114 Wn.2d, at 252.

Because the court in American National Can refused to consider federal law, its decision concerning the retroactive application of the 1987 credit law to the interim period is of questionable value. Although remedies are a matter of state law, Beam and Harper direct that such remedies must comply with the requirements of federal due process of law. Under federal due process requirements, the retroactive application of the 1987 credit law results in a denial of due process since it denies taxpayers a full refund on the basis that the statute at issue in Tyler Pipe was unconstitutional. Indeed, in American National Can, the court acknowledged that the credits allowed under the 1987 credit law were a "small fraction" of the total taxes actually collected, but dismissed taxpayers' arguments as "merely a complaint about the magnitude of the credits' effect". Id., at 247-248. Thus, the court held Tyler Pipe to be limited to prospective relief only. The Department's current reliance on American National Can is, at best, tenuous. The 1987 credit law may have been constitutional on its face, but after the court's decision in American National Can, the law must be held

unconstitutional as applied.

Further, it may be that the state could, on a prospective basis, design a tax scheme that meets minimum federal due process requirements, but when applied retroactively, does not meet such due process requirements because the scheme provides less than full refunds or credits to affected taxpayers. This would be the result of giving full retroactive effect to the 1987 credit law. The requirements of federal due process under an unconstitutional tax system are clearly not met by these minimum requirements. Instead, federal law mandates full refunds, or the equivalent, during the period in which the law was declared to be unconstitutional.

In summary, Digital is entitled to either a full refund or some other "in hindsight", non-discriminatory refund remedy. Harper is clear in its admonition to the states that under no circumstances can the states confine taxpayers like Digital to a lesser remedy. Harper, 113 S. Ct., at 2520. Contrary to the Department's contention, the state cannot simply pass retroactive statutes in an attempt to deny Digital and other taxpayers full relief from the unconstitutional imposition of a tax. Federal due process prohibits such a result.

V. CONCLUSION

National Can is no longer controlling law due to the subsequent U. S. Supreme Court decisions in Beam and Harper. Federal law now mandates retroactive relief for B&O taxes unconstitutionally imposed before the 1987 law became effective (on August 12, 1987), or certainly before June 23, 1987, the day the United States Supreme Court held Washington's B&O tax unconstitutional in Tyler Pipe.

Moreover, Harper requires every court to give retroactive effect to the applicable rule of federal law. Here, the controlling rule was set out by the United States Supreme Court in Tyler Pipe and, under Harper, this court must give full retroactive effect to the Supreme Court's decision in every case still open on direct review. Digital's case is still open on direct review. Therefore, Digital is entitled to a full refund of those taxes paid under the tax scheme found to be unconstitutional in Tyler Pipe.

For all of the above reasons, the court should deny the Department's cross-motion for summary judgment.

RESPECTFULLY SUBMITTED this 27th day of May, 1994.

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SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

DIGITAL EQUIPMENT CORPORATION,	)	
	)	NO. 87-2-01627-4
Plaintiff,	)	
v.	)	DIGITAL'S REPLY TO
	)	DEPARTMENT'S
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,	)	MEMORANDUM IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT
Defendant.	)	

I. INTRODUCTION

The issues have been extensively briefed by both parties in their respective motions for summary judgment and responses thereto. Accordingly, this reply memorandum focuses on the four fundamental flaws in the Department's arguments: (1) the Department fails to recognize that the federal rule in Tyler Pipe controls; (2) the Department cannot show that Digital's claim is procedurally barred or res judicata; (3) the facts negate the existence of a valid predeprivation remedy for Digital; and (4) a retroactive application of the 1987 credit law offends federal due process requirements and violates Washington rules of statutory construction. Each of these arguments are discussed below.

. . . .

IV. THE DEPARTMENT'S PREDEPRIVATION REMEDIES ARGUMENT IS A "RED HERRING"

The Department argues that the excise tax anti-injunction statute (RCW 82.32.150), the Uniform Declaratory Judgments Act (chapter 7.24 RCW), and the Administrative Procedures Act (chapter 34.05 RCW), all contain adequate predeprivation procedural remedies against the exaction of unlawful taxes which satisfy the due process requirements of McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S. Ct. 2238, 2251-2252, 110 L. Ed. 2d 17 (1990); see also Harper, 113 S. Ct., at 2520, and therefore, Digital is not entitled to a refund. This argument has no validity, is essentially a "red herring" and ignores the undisputed facts of this case.

During the years 1983 through June 1987, Digital *paid* the disputed B&O taxes on its regular monthly excise tax returns filed with the Department. On August 27, 1987, Digital filed a petition in Thurston County Superior Court seeking a *refund* of certain B&O taxes paid erroneously. This was in accordance with the holding of the U.S. Supreme Court in Tyler Pipe. Neither the anti-injunction statute, the declaratory judgments act, nor the administrative procedures act could have been invoked by Digital because it had already *paid* the taxes in question to the State. When it filed its refund petition in August 1987, Digital's *only remedy* was a suit for refund of the unlawfully paid B&O taxes. Clearly, injunctive relief, or any remedy provided by the declaratory judgments act or administrative procedures act, were wholly inadequate. The only remedy Digital sought for the 1983 through August 1987 period was a refund under RCW 82.32.060 of the unconstitutional taxes it had previously paid.

Even if the issue of adequate predeprivation remedies is properly before this court, the Department's argument that Digital did indeed have adequate predeprivation remedies is

wrong because the Department always vigorously opposes any injunctive relief for taxpayers. Its reason is the same each time - injunctive relief should not be granted if there is a plain, speedy and adequate remedy at law and RCW 82.32.060 provides that remedy because it allows a taxpayer a refund if it is successful in its suit. See Tyler Pipe Industries v. Department of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982); see also Kirkland v. Department of Revenue, 45 Wn. App. 720, 727 P.2d 254 (1986). Indeed, the Washington Supreme Court in Tyler Pipe went even further when it stated that, "Society's strong interest in the collection of taxes has led to the longstanding public policy which disfavors the issuance of injunctions." Tyler Pipe, 96 Wn.2d, at 796. Thus, the State Supreme Court disapproves of taxpayer injunctions against the collection of taxes on "public policy" grounds, making them virtually impossible to obtain. In short, any discussion now by the Department of alternative predeprivation remedies available to Digital is only intended to confuse this court.

V. FEDERAL DUE PROCESS REQUIRES A FULL REFUND BE GIVEN TO DIGITAL; A B&O TAX CREDIT UNDER THE 1987 CREDIT LAW IS NEITHER AUTHORIZED BY LAW NOR DOES IT PROVIDE MEANINGFUL BACKWARD-LOOKING RELIEF TO DIGITAL

Finally, the Department argues that the 1987 credit law (see RCW 82.04.440; Laws of 1987, 2d Ex. Sess., ch 3, § 3), which the State Supreme Court in American National Can Corp. v. Department of Revenue, 114 Wn.2d 236, 787 P.2d 545 (1990) held applied "retroactively" from June 23, 1987, the day Tyler Pipe was decided by the U.S. Supreme Court, to August 12, 1978, the day the 1987 credit law became effective, is the only remedy to which Digital is entitled in this proceeding. Federal due process, as explained in McKesson and Harper,

requires meaningful backward-looking relief and this requirement is *not* satisfied by the retroactive extension of these credits.

After the U.S. Supreme Court declared the multiple activities statute unconstitutional in Tyler Pipe on June 23, 1987, the Washington Legislature met in special session and amended the unconstitutional statute. The Department argues that this amendment "unequivocally forbids . . . full refunds of all taxes paid". Department's Memorandum In Opposition, p. 15. In other words, the Department is asking the court to authorize this result: A law (RCW 82.04.440) was declared unconstitutional by the U.S. Supreme Court. After the U.S. Supreme Court declared the tax statute unconstitutional, the State Legislature met and passed a new law which they allegedly intended to apply "retroactively". This law allows credits to taxpayers which the State Supreme Court has acknowledged are a "small fraction" of the total taxes actually collected. American National Can, 114 Wn.2d, at 247.

The State's action was an admitted attempt to amend an existing unconstitutional statute with an amendment which contravenes a prior U.S. Supreme Court decision on the statute. This circumvention of the federal rule on retroactivity can hardly be said to satisfy federal due process requirements. McKesson, supra; Harper, supra.

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Under Harper, Digital has both a substantive and vested constitutional right to the retroactive application of the federal rule in Tyler Pipe. That right would unquestionably be affected by the retroactive application of the 1987 credit law because the Commerce Clause discrimination would continue. Digital would still be paying the unconstitutional B&O tax but, under the credit law, that payment would only be reduced by a small amount of

credits allowed. Not only does this violate the federal rule on retroactivity, but Washington law on statutory construction does not support such a result.[2]

In essence, applying the amendments retroactively to Digital would overrule the U.S. Supreme Court's decision in Tyler Pipe. It would also "make the legislature a court of last resort", Marine Power, 39 Wn. App., at 614, citing 1A C. Sands, Statutory Construction § 27.04, at 313 (4th ed. 1973), and "would create serious issues concerning the doctrine of separation of powers". Marine Power, id., citing Johnston v. Morris, 87 Wn.2d 922, 926, 557 P.2d 1299 (1976). The retroactive application of the 1987 credit law is strictly prohibited, because it contravenes both federal and state rules of law. Marine Power, 39 Wn. App., at 616-619.

VI. CONCLUSION

For all of the above reasons, Digital's motion for partial summary judgment should be granted.

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[2]There is nothing in the 1987 statutory amendment itself which makes the credit law retroactive. Indeed, the retroactive language was *not* included in the statute but rather, was included in the legislative intent section of the amendment. We are aware of no authority which makes such "legislative intent" language binding. Without such language appearing in the statute itself, the statute is presumed to apply prospectively only.

RESPECTFULLY SUBMITTED this 10th day of June, 1994.

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SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

DIGITAL EQUIPMENT CORPORATION,	)	
	)	NO. 87-2-01627-4
Plaintiff,	)	
v.	)	MOTION FOR RECONSIDERATION
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,	)	AND SUPPORTING MEMORANDUM
Defendant.	)	

I. RELIEF REQUESTED

Plaintiff Digital Equipment Corporation ("Digital"), by and through its attorneys George C. Mastrodonato and Lane Powell Spears Lubersky, moves this court for reconsideration of the court's September 9, 1994 Opinion Letter, and declares:

A. Digital is entitled to a refund of Business and Occupation ("B&O") taxes paid to the defendant, Department of Revenue ("Department"), during the period January 1, 1983 through August 11, 1987, under the United States Supreme Court's ruling in Tyler Pipe Industries, Inc., et al. v. Washington Department of Revenue, 483 U.S. 232, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987) ("Tyler Pipe"), which held a portion of Washington's B&O tax unconstitutional.

B. The Washington Supreme Court's later decision in National Can Corporation v. Washington Department of Revenue, 109 Wn.2d 878, 749 P.2d 1286, appeal dismissed,

cert. denied, 486 U.S. 1040, 100 L. Ed. 2d 615, 108 S. Ct. 2030 (1988) ("National Can II"), which, on remand, applied Tyler Pipe on a purely prospective basis and refused to order refunds of unconstitutionally collected B&O taxes paid by affected taxpayers, has been superseded by two intervening United States Supreme Court decisions that now require every court to give retroactive effect to the Tyler Pipe decision. James Beam Distilling Co. v. Georgia, 501 U.S. ___, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991) ("Beam"), and Harper v. Virginia Department of Revenue, 509 U.S. ___, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993) ("Harper").

C. Under Beam and Harper, Digital is entitled to a refund of the B&O taxes it paid between January 1, 1983 and August 11, 1987, because its claim is "still open on direct review", Harper, 113 S. Ct., at 2516, is "not barred by procedural requirements or res judicata", Beam, 111 S. Ct., at 2447, and because Washington law does not offer "a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing". McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 38, n. 21, 110 S. Ct. 2238, 2251, n. 21, 110 L. Ed. 2d 17 (1990) ("McKesson").

. . . .

III. ISSUE PRESENTED

Did the court err in concluding that the Washington Supreme Court's National Can II ruling correctly applied the United States Supreme Court's decision in Tyler Pipe prospectively only?

. . . .

IV. ARGUMENT

. . . .

C. After Harper The Only Situation That Might Preclude Retroactive Refunds To Taxpayers Who Paid An Unconstitutional State Tax Is If The State Provided A Predeprivation Process That Satisfied Federal Due Process Guidelines.

"Harper's major effect on subsequent cases is the Court's holding that its application of a rule of federal law shall be given retroactive effect in all future cases. Harper, . . . 113 S. Ct., at 2513. See United Food and Commercial Workers Int'l Union AFL-CIO, Local No. 150-A v. NLRB, 1 F.3d 24, 35 (D.C. Cir. 1993)." Cambridge State Bank and Norwest Bank Duluth, National Association, et al. v. John P. James, et al., 514 N.W. 2d 565, 568, n. 5 (1994).[2] But, because a rule of federal law must be given retroactive effect, this does not necessarily entitle

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[2]In this case, the Minnesota state supreme court, observing that Harper permits a state to deny aggrieved taxpayers a retroactive remedy only if it affords them a meaningful predeprivation remedy, held that Minnesota had not afforded banks a predeprivation remedy sufficient to satisfy the McKesson federal due process standards because the question of whether a Minnesota taxpayer could pose a constitutional challenge to a state tax without first paying the contested tax was unsettled at the time the banks filed their suit and, thus, at the time the banks initiated their suit, the only certain remedy available was the tax refund statute under which they proceeded. A petition for certiorari has been filed with the United States Supreme Court and is pending in this case. Norwest Bank Duluth and Cambridge State Bank et al., U.S. Supreme Court, Docket No. 94-331, petition for certiorari filed August 22, 1994.

a taxpayer to a refund. Harper, 113 S. Ct., at 2519. Instead, the Constitution requires a state like Washington

> . . . "to provide relief consistent with federal due process principles." American Trucking, 496 U. S., at 181, 110 S. Ct., 2332 (plurality opinion). Under the Due Process Clause, U. S. Const., Amdt. 14, § 1, "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 39-40, 110 S. Ct. 2238, 2251-2252, 110 L. Ed. 2d 17 (1990). If Virginia "offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing," the "availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause." Id., at 38, n. 21, 110 S. Ct., at 2251, n. 21. On the other hand, if no such predeprivation remedy exists, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." Id., at 31, 110 S. Ct., at 2247 (footnotes omitted). In providing such relief, a State may either award full refunds to those burdened by an unlawful tax or issue some other order that "create[s] in hindsight a nondiscriminatory scheme." Id., at 40, 110 S. Ct., at 2252. Cf. Davis, 489 U.S., at 818, 109 S. Ct., at 1509 . . .

Harper, 113 S. Ct., at 2519-2520. Thus, McKesson held that a

state may choose to provide taxpayers with either a predeprivation or postdeprivation procedure.[3]

> Harper holds that the existence of a predeprivation remedy which meets the tests set out in McKesson is a preliminary question which determines the remedy required for an unlawful tax under the Due Process Clause of the federal constitution. Harper, --- U. S. at ---, 113 S. Ct. at 2519. . . . [A]fter Harper the existence of a meaningful predeprivation remedy is a necessary precondition to denying a retroactive remedy on any state law theory.

Cambridge State Bank, 514 N.W. 2d, at 569. Thus, if there was a meaningful predeprivation procedure in Washington at the time Digital paid the B&O taxes in question, then this court may deny backward-looking (retroactive) relief. On the other hand, if those procedures did not exist or were not "meaningful" then the court must design a "clear and certain" backward-looking remedy which creates in hindsight a non-discriminatory tax

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[3]"A predeprivation procedure must allow taxpayers to sue to enjoin imposition of the tax prior to payment or to withhold payment and present their objections as defenses in a tax enforcement proceeding. . . . [A] postdeprivation procedure, however, . . . must provide one of the following 'clear and certain' remedies: a refund of taxes unlawfully exacted, a retroactive tax on the benefitted taxpayers, or a combination of a partial refund and a partial retroactive assessment to create "in hindsight a nondiscriminatory scheme." Cambridge State Bank, 514 N.W. 2d, at 568.

scheme. See Cambridge State Bank, 514 N.W.2d, at 568.[4]

McKesson held that if a state chooses this latter course of action, it must provide retrospective relief upon a determination that the tax was unlawfully enacted. McKesson, 110 S. Ct., at 2251-2252. Washington did not and does not provide taxpayers with the opportunity to challenge a tax assessment in court without first paying the taxes at issue (see RCW 82.32.180), and so its predeprivation procedures do not satisfy federal due process requirements.

Between 1983 and 1987, the period during which Digital seeks a B&O tax refund, as well as today, taxpayers challenging taxes in Washington are able to file for tax refunds in Superior

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[4]The U.S. Supreme Court will hear oral arguments on October 11, 1994, in a case to decide whether Georgia provided a clear and certain remedy to federal retirees who paid state income taxes that were illegal under the doctrine of intergovernmental immunity. Reich v. Collins, 263, Ga. 602, 437 S.E.2d 310 (1993). At issue in this case is whether Georgia afforded a federal military retiree sufficient predeprivation remedies to justify its denial of his request for a refund of the Georgia personal income tax that he had paid on his federal military retirement benefits. Despite its refusal to grant refunds to federal retirees, Georgia has amended its tax law to provide identical treatment for federal, state, and private pensions. After the Georgia Supreme Court (Ibid.) upheld the state's refusal of refunds, the U.S. Supreme Court remanded the case (Reich (No. 92-1276, June 28, 1993) for reconsideration in light of Harper. On remand, the Georgia court ruled that the taxpayer was not entitled to a refund because he had been given ample predeprivation remedies allowing a challenge to the tax imposed prior to payment of the tax, which satisfied federal due process requirements. (Reich, U.S. Supreme Court, Docket No. 93-908, petition for certiorari granted February 22, 1994; oral argument scheduled for October 11, 1994.)

Court, but are required to pay the taxes first. RCW 82.32.180.[5] Further, RCW 82.32.150 allows taxpayers the opportunity to seek injunctions against the state in tax cases involving constitutional claims. But, as argued in Digital's Reply To Department's Memorandum In Opposition To Motion For Partial Summary Judgment (see Section IV) and Response To Department of Revenue Memorandum In Support of Cross-Motion For Summary Judgment (see Section IV., B., 1.), the Department vigorously opposes such requests. See Tyler Pipe Industries v. Department of Revenue, 96 Wn.2d 785, 638, P.2d 1213 (1982) (A taxpayer seeking an injunction against the state in a tax case based on constitutional grounds must not only satisfy RCW 82.32.150, but must also meet the equitable criterion governing an injunction's issuance because "injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law" and Washington law "provides the legal remedy of a refund suit"). Thus, during the tax period in question, Washington clearly did not provide a meaningful predeprivation remedy to taxpayers paying unconstitutional taxes.

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[5]The state did have an administrative procedure for contesting tax assessments without first paying the contested taxes (see RCW 82.32.160 and WAC 458-20-100) but administrative bodies cannot rule on the constitutionality of statutes (Yakima Clean Air v. Glascam Builders, 85 Wn.2d 255, 534 P.2d 33 (1975)). Moreover, paying the contested taxes prior to filing a refund suit in Thurston County Superior Court is a statutory prerequisite to having the case heard outside the Department's administrative hearing process. The administrative hearing process does not provide taxpayers the "meaningful opportunity" to challenge a tax assessment in court prior to paying the disputed taxes as required by McKesson.

McKesson commands that the court "design a clear and certain remedy which creates in hindsight a nondiscriminatory scheme." Cambridge State Bank, 514 N. W. 2d, at 571, citing McKesson, 110 S. Ct., at 2251-2252. What, then, creates an in hindsight nondiscriminatory scheme? McKesson offers three choices: (1) a full refund of the unconstitutional taxes collected, (2) a retroactive tax on taxpayers exempted from the B&O tax, or (3) a combination of the two remedies. McKesson, 110 S. Ct., at 2252-2253. In reality, however, there is now only one option to Digital remaining - a full refund of the unconstitutional B&O taxes it paid between January 1, 1983 and August 11, 1987. This is so because the statute of limitations for assessments (RCW 82.32.050) against other taxpayers has expired for this period, thereby eliminating options (2) and (3) above.

If this court does not choose relief in the form of a full refund of taxes paid, the court must then fashion a remedy which satisfies "minimum federal requirements". McKesson, 110 S. Ct., at 2257-2258. This "allows relief beyond the demands of federal due process", 110 S. Ct. at 2258, N. 36, "but under no circumstances may it confine [taxpayers] to a lesser remedy", Harper, 113 S. Ct., at 2520, citing McKesson, 110 S. Ct., at 2254-2258.[6]

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[6]The Department may again argue that the B&O tax credits (see RCW 82.04.440) enacted effective August 12, 1987, satisfy federal due process requirements. However, this will confine Digital "to a lesser remedy" which is forbidden by both Harper and McKesson.

VI. CONCLUSION

Beam and Harper require that the Court's ruling in Tyler Pipe be applied retroactively. Equitable considerations have been negated by the Supreme Court's directives in Harper. Digital is entitled to receive a tax refund even if National Can failed in its efforts. The only factor that would deny Digital a retroactive refund today is if Washington law contained a predeprivation remedy that satisfied federal due process standards during the period in question. Since payment of the B&O taxes was a precondition to taxpayers filing a lawsuit in Superior Court, this court is required to design a clear and certain remedy for Digital which creates a backward-looking (retroactive), non-discriminatory scheme. A full refund of the unconstitutionally collected B&O taxes is the only remedy which satisfies this requirement.

Therefore, Digital is entitled to a refund of the unconstitutional B&O taxes it paid between January 1, 1983 and August 11, 1987, interest on the refund (RCW 82.32.060(5)) and an award of attorneys' fees under 42 U.S.C. §§ 1983 and 1988. See Dennis v. Higgins, 498 U.S. 439, 112 L. Ed. 2d 969, 111 S. Ct. 865 (1991).

RESPECTFULLY SUBMITTED this 5th day of October, 1994.

LANE POWELL SPEARS LUBERSKY

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SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

DIGITAL EQUIPMENT CORPORATION,	)	
	)	NO. 87-2-01627-4
Plaintiff,	)	
v.	)	PLAINTIFF'S REPLY
	)	MEMORANDUM IN
STATE OF WASHINGTON,	)	SUPPORT OF
DEPARTMENT OF	)	MOTION FOR
REVENUE,	)	RECONSIDERATION
	)	
Defendant.	)	
	)	

I. INTRODUCTION

Plaintiff, Digital Equipment Corporation ("Digital"), submits this memorandum in reply to defendant State of Washington Department of Revenue's ("the Department's") Memorandum In Opposition To Plaintiff's Motion For Reconsideration filed on October 14, 1994. The Department's memorandum in opposition asks the court to deny Digital's motion for reconsideration. Because the Department's position is based on erroneous arguments and does not follow U. S. Supreme Court decisions, the court should grant Digital's motion for reconsideration and reverse its September 9, 1994 Opinion Letter. Digital's B&O tax refund claims for periods between January 1, 1983 and June 23, 1987, should therefore be granted.

II. ARGUMENT

. . . .

C. The Department's Arguments Do Not Support A Summary Judgment In Its Favor.

. . . .

Finally, the only inquiry remaining for this court is whether Digital is entitled to a refund of the unconstitutional taxes it paid to Washington between January 1, 1983 and August 11, 1987. In answering this inquiry, the determining factor is whether, during the applicable period, Washington law contained a predeprivation remedy for Digital that satisfied Fourteenth Amendment Due Process standards. Harper, 113 S. Ct., at 2519, citing McKesson Corporation v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 L. Ed. 2d 17, 110 S. Ct. 2238 (1990). As argued in Digital's motion for reconsideration, no predeprivation remedy existed then (or even now). Therefore, the Due Process Clause requires "meaningful backward-looking relief" to rectify the unconstitutional deprivation. In this case, the Due Process Clause can only be satisfied by the court awarding a full refund of the unlawful B&O taxes collected. Ibid., 496 U.S., at 40.

III. CONCLUSION

For all of the above reasons, Digital's motion for reconsideration should be granted, thereby reversing the court's September 9, 1994 Opinion Letter which denied Digital's refund claims for the January 1, 1983 through August 11, 1987 period, and which granted summary judgment to the Department.

RESPECTFULLY SUBMITTED this 21st day of October, 1994.

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(3)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DIGITAL EQUIPMENT CORPORATION,

Petitioner

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Washington

REPLY TO BRIEF IN OPPOSITION

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SUMMARY OF REPLY

The Department of Revenue's brief evades the history (and evolution) of this Court's Due Process Clause precedents.[1] The Department does not deny that the Washington legislature adopted the 1987 credit law (in relevant part) to deprive taxpayers of their preexisting refund remedy, in the event a court ordered retrospective relief under Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987). Digital identified several reasons, grounded in the history and evolution of tax refund jurisprudence, why such an action can no longer be fairly reconciled with the mandates of due process, especially in the Commerce Clause context:

- This Court's shift in favor of protecting taxpayer rights, based on the fundamental principle that a state obtaining the money or property of others without authority must repay that money or property. See Pet. at 16-21 (citing and discussing Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U.S. 280 (1912), and related authorities);

- This Court's most recent articulation and application of these principles, in the context of continuing state efforts to avoid refunding tax monies collected in violation of the Commerce Clause, notwithstanding this Court's rejection of case-by-case retrospectivity. See Pet. at 22-23 (citing and discussing Reich v. Collins, 513 U.S. ___, 130 L. Ed. 2d 454 (1994), and Reynoldsville Casket Co. v. Hyde, 514 U.S. ___, 131 L. Ed. 2d 820 (1995)) & 25-26 (citing and discussing Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993), and related authorities);

- The danger to free trade interests protected by the Commerce Clause, if states are allowed to refuse to refund monies collected from out-of-state taxpayers in violation of Commerce

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[1] Cf. Camps Newfound/Owatonna, Inc. v. Town of Harrison, ___ U.S. ___, 1997 WL 255351, *15 (No. 94-1988, May 19, 1997) ("history, including the history of commercial conflict that preceded the constitutional convention as well as the uniform course of Commerce Clause jurisprudence animated and enlightened by that early history, provides the context in which individual controversy must be judged").

Clause strictures, based on after-the-fact changes in state remedy laws made for the express purpose of avoiding making such restitution.

The Department's brief does not respond to these contentions. Instead, the Department urges this Court to deny Digital's petition, because this case ostensibly is not a proper vehicle for the resolution of the question presented by Digital's petition. The Department is wrong, for the reasons set forth below.

ARGUMENT ON REPLY

A. Digital Preserved Its Due Process Claim.

The Department claims Digital did not preserve the question presented by Digital's petition, because Digital ostensibly did not raise a due process theory in the trial court, based on either Reich v. Collins or Reynoldsville Casket Co. v. Hyde. Br. Opp. at 13-14. The Department ignores that Reich and Reynoldsville were decided by this Court *after the trial court had rendered its decision, and dismissed Digital's case*. Contrary to the Department's assertion, Digital raised a federal due process claim at each stage of the state court proceedings, and Digital only modified its *argument* in support of that claim in response to this Court's latest decisions in this area.[2]

In April 1994, Digital moved for partial summary judgment, on the grounds that Tyler Pipe should now be given retroactive effect, in light of Harper v. Virginia Dept. of Taxation and related authority. See Digital's Memorandum at 1-2, 15-25 (Reply. App. 1a-2a, 3a-18a). Digital also claimed it was entitled to a refund, and specifically argued that federal due process requirements forbade the retroactive application of the 1987 credit law. Id. at 21-24 (Reply. App. 12a-16a).[3] On September 9,

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[2]"Parties are not limited to the precise arguments they made below." Yee v. Escondido, 503 U.S. 519, 534 (1992) (citations omitted).

[3]When the Department cross-moved for a summary judgment of dismissal, (continued...)

the Thurston County Superior Court issued its "Opinion Letter," denying Digital's motion and granting the Department's motion in part (the court reserved ruling on the "interim period" of June 23 through August 11, 1987). See Pet. App. 40a-45a. On October 5, 1994, Digital moved for reconsideration, *and alerted the trial court to the pendency of Reich* (then scheduled for oral argument on October 11, 1994). See Digital's Reconsideration Motion at 13, n.4 (Reply App. 26a-27a); see also Reconsideration Motion at 11-15 (Reply App. 23a-30a). On November 7, 1994, the court denied reconsideration and granted the Department summary judgment on the interim period refund claim. See Dept. App. 1a-2a.

On November 18, the court entered its formal order of dismissal; on December 15, Digital timely appealed directly to the Washington Supreme Court. Nine days before -- on December 6 -- this Court decided Reich. On January 31, 1995, Digital submitted its Statement of Grounds for Direct Review,[4] in which Digital addressed the impact of Reich on the due process claim. Statement at 11-15 (Reply App. at 33a-36a). The Washington Supreme Court granted direct review. On May 3, 1995, Digital submitted its opening brief, in which Digital more fully developed its due process claim in light of Reich. See Opening Brief at 1-7, 26-33 (Reply App. 38a-43a, 44a-52a). On May 15, 1995, this Court decided Reynoldsville. On August 24, 1995, Digital submitted its Reply Brief, in which Digital set forth *precisely* the theory that Digital has presented to this Court, based expressly on this Court's reasoning in Reynoldsville. Reply Brief at 12 (Reply App. 57a-58a) (footnote omitted) (emphasis in the original); see also Reply Brief at 10-13, 16-23 (Reply App. 54a-59a, 60a-70a). At oral argument, Digital further elaborated on this theory, referencing several of the cases relied on before this Court. See Pet. App. at 70a-74a; Reply App. at 71a-76a.

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[3](...continued)
Digital reiterated its contention that the retroactive application of the 1987 credit law results in a denial of due process. See Digital's Response Memorandum at 27 (Reply App. 20a-21a) (emphasis added).

[4]See Washington Rule of Appellate Procedure 4.2 (discussing the requirement of the Statement of Grounds, in direct review cases).

At no time did the Department ever claim that Digital had failed to present this due process theory in the Superior Court. Moreover, the Washington Supreme Court *did* address the due process issue, but resolved it on the basis of a supposed oral argument admission that was never made (as Digital demonstrated in its motion for reconsideration). See Pet. at 12-15. In sum, Digital gave the Washington court system a fair opportunity to address the due process claim, and the Washington Supreme Court did address the issue.

B. The Decision of the Washington Supreme Court Constitutes Binding Precedent on the Question Presented by Digital's Petition.

The Department asserts that Justice Smith's opinion is of no precedential force on the due process claim, because Chief Justice Durham's concurrence supposedly constitutes the Washington Supreme Court's holding under the "narrowest grounds" doctrine for plurality opinions. See Br. Opp. at 3-10.[5] First, the Department ignores that Justice Guy expressly limited his dissent to "the retroactivity issue." 916 P.2d at 947 (Pet. App. 32a). Given that the retroactivity issue could not resolve Digital's refund claim for the interim period (June 23-August 11, 1987), and that Justice Guy also voted to affirm the trial court (Pet. App. 37a), Justice Guy (and his fellow dissenters on the retroactivity issue) therefore joined Justice Smith on the due process issue, making a seven vote majority for the ratio decidendi giving rise to the question presented by Digital's petition.

Second, Chief Justice Durham's concurrence is the antithesis of a decision based on the narrowest ground.[6] The Chief Justice based her concurrence on a ground that she admitted had not been raised by either party, and also conflicted with the

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[5]The Department also asserts that Digital inaccurately implied that Smith's ratio decidendi commanded a majority on all points in dispute. See Br. Opp. at 3, n.2. Digital said the *opposite*, acknowledging that Justice Smith's rationale did not command a majority, on all points. See Pet. at 12, n.16.

[6]See generally Note, "The Precedential Value of Supreme Court Plurality Decisions," 80 Colum. L. Rev. 756 (1980).

court's prior decisions. See 916 P.2d at 942 (Pet. App. 20a) ("I disagree with . . . some of the assumptions made by the parties and our prior cases"). This willingness to resolve a case on a ground not addressed in the briefing and argument (and which does not go to any question of subject matter jurisdiction) is not consistent with the conservative jurisprudential approach underlying the "narrowest grounds" test. Cf. Nelson v. McClatchy Newspapers, Inc., 131 Wash. 2d 279, 931 P.2d 870, 880 (1997) (majority opinion for the court by Sanders, J.) (criticizing the concurring minority for basing their decision on a ground which had "neither been raised nor briefed by the parties").

Moreover, Chief Justice Durham's preferred ground for decision required the court to hold that Digital was entitled to no relief, because Washington's multiple activities exemption tax scheme supposedly did not violate the Commerce Clause when applied to out-of-state manufacturers like Digital. See Pet. App. 23a-26a. To reach this result, the Chief Justice criticized *this Court* for what she called "erroneous suggestion[s]" and dicta in Tyler Pipe. See id. at 25a-26a.[7] Based on this critique, the Chief Justice urged her court to rule that the *1985* credit law constituted Digital's remedy for any constitutional violations, and that *this* law satisfied due process requirements. Pet. App. 29a.[8]

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[7]In fact, Chief Justice Durham plainly misread this Court's holding, which expressly found that applying the MAE tax scheme to out-of-state manufacturers also constituted a facial Commerce Clause violation. Tyler Pipe, 483 U.S. at 248.

[8]The Chief Justice proposed to avoid the retroactivity trigger of the 1987 credit law, by holding that the MAE scheme as it existed prior to August 1987 included the 1985 credit law, and that Digital's claim therefore would not be governed by the 1987 law. Pet. App. 29a. The Chief Justice did not explain how the 1985 credit law, *which substituted a credit to local manufacturers for the exemption they previously received while refusing to grant any credit to out-of-state manufacturers*, could possibly constitute a meaningful backward-looking remedy for Digital, should the court find that taxing Digital did violate the Commerce Clause. Nor did the Chief Justice explain how applying the 1985 credit law, pursuant to an after-the-fact retroactivity trigger substantively identical to the 1987 trigger, so as to wipe out Digital's refund claim for the period from January 1, 1983, to the date of the adoption of the 1985 law, could avoid *precisely* the due process infirmity at issue in this case.

In other words, Chief Justice Durham proposed that her colleagues hold that Tyler Pipe granted no relief to out-of-state manufacturers, and on that basis affirm the trial court. This suggestion ignored the plain language of this Court's decision, and would have been tantamount to declaring the 1987 credit law an exercise in legislative surplusage. Under no reasonable application of the "narrowest grounds" test, can this radical ratio decidendi be found to state the controlling rule of the Washington Supreme Court's decision in this case.

C. Washington Did Not Afford Digital a Meaningful Predeprivation Remedy.

The Department claims Digital had a meaningful predeprivation remedy, specifically: (1) the right to seek preliminary injunctive relief; and (2) the right to seek declaratory relief. See Br. Opp. at 23-24. The Department is wrong.

1. No Meaningful Opportunity for Preliminary Injunctive Relief. The Department claims RCW 82.32.150 represents a meaningful opportunity for preliminary injunctive relief, because the statute exempts constitutional challenges from its prohibition on "restraining order[s] or injunctions . . . to restrain or enjoin the collection of any tax . . . ." See Br. Opp. at 23, n.13 & 24, n.14; Pet. App. 62a (reproducing RCW 82.32.150). Although the Department criticizes Digital's reading of the Washington Supreme Court's decision in Tyler Pipe Industries, Inc. v. Department of Revenue, 96 Wash. 2d 785, 638 P.2d 1213 (1982),[9] the Department tacitly admits that this decision states the controlling test for preliminary injunctive relief in tax cases. See Br. Opp. at 24, n.14. Under that test, preliminary injunctive relief will not be granted unless (among other things) the taxpayer shows a "clear legal or equitable right" to relief. Tyler

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[9]Although the Department correctly states that the Washington Supreme Court has not *categorically* ruled out the possibility of preliminary injunctions in tax cases, the Department does not acknowledge that this reflects Washington's separation of powers doctrine, under which the Legislature could not *absolutely* prohibit the availability of such relief in a tax (or any other) case. Tyler Pipe, 638 P.2d at 1215 ("the legislature can never totally deprive the courts of their constitutional equity powers" (citation omitted)).

Pipe, 638 P.2d at 1217 (citation and quotation omitted). Moreover, the issuance of a preliminary injunction in "a doubtful case" constitutes an abuse of trial court discretion. Id. (citation and quotation omitted).

Contrary to the Department's claim, there are *three* principal time periods, relevant to this issue:

- January 1, 1983 to June 12, 1984. Prior to the date this Court decided Armco, Inc. v. Hardesty, 467 U.S. 638 (1984), any Commerce Clause challenge to the MAE scheme was indisputably controlled by the decisions in B.F. Goodrich Co. v. State, 38 Wash. 2d 663, 231 P.2d 325 (1951), and General Motors Corp. v. State, 60 Wash. 2d 862, 376 P.2d 843 (1962), aff'd, 377 U.S. 436 (1964), in which the Washington Supreme Court rejected such challenges. Given the obligation of Washington trial courts to follow these decisions under the rule of stare decisis, Digital did not have a meaningful opportunity for preliminary injunctive relief during this period.

- June 13, 1984 to March 6, 1986. Between Armco and the Washington Supreme Court's decision in National Can Corp. v. Department of Revenue, 105 Wash. 2d 327, 715 P.2d 128 (1986) (National Can I), Digital could have argued that Armco had fatally undermined the authority of the Washington Supreme Court's decisions in B.F. Goodrich and General Motors. But this at most would have given rise to the sort of "doubtful case" which the Washington Supreme Court had already held could not support a preliminary injunction. See Tyler Pipe, 638 P.2d at 1214.

- March 7, 1986 to June 22, 1987. Until this Court's Tyler Pipe decision, Washington trial courts were bound to reject Commerce Clause challenges to the MAE scheme, under the controlling authority of National Can I.

Thus, at no time from January 1, 1983, through this Court's decision in Tyler Pipe, did Digital have a meaningful opportunity for preliminary injunctive relief.[10] Before this

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[10]The taxes at issue for the first and third periods total approximately (continued...)

Court's decision in Armco, and again after National Can I, granting preliminary injunctive relief would have required a Washington trial court to disregard plainly controlling decisions of its Supreme Court. Between Armco and National Can I, the same trial court would have had to conclude that Armco so clearly undermined two otherwise controlling decisions of the Washington Supreme Court, as to render Digital's right to preliminary injunctive relief free of doubt. In short, Digital's theoretical right to seek preliminary injunctive relief did not constitute the *meaningful* opportunity for predeprivation relief that could relieve Washington of its due process obligation to afford a refund.[11]

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[10](...continued)
$1,035,000 and $608,000 for the second. There is also the "interim period," from June 23, 1987 through August 11, 1987 (the day before the 1987 tax credit law became effective). This, too, would have presented at best a doubtful case for preliminary injunctive relief, given the uncertain state of statutory remedies in the wake of Tyler Pipe. In fact, the Washington trial courts denied preliminary injunctive relief in the subsequent action brought to challenge the 1987 credit law, and the Washington Supreme Court refused to review that decision, on the ground that the trial court correctly determined there was no clear right to such relief. (Reply App. 79a-85a). There is no reason to believe the courts would have acted differently for claims arising during the interim period.

[11]The Department, citing the intermediate appeals court decision in Shutt v. Moore, 26 Wash. App. 450, 613 P.2d 1188 (1980), also claims a taxpayer need not prepay taxes when making a constitutional challenge. See Br. Opp. at 23, n.13. Shutt conclusorily asserts, by way of footnote dictum, that RCW 82.32.150 "waive[s]" the prepayment obligation in such circumstances. 613 P.2d at 1192 n.4. The statute does not say that, and Shutt was decided two years before the Washington Supreme Court's restrictive interpretation of RCW 82.32.150 in the first Tyler Pipe decision. The Department also claims the Washington trial or appellate courts "often have issued preliminary or permanent injunctions[,]" see Br. Opp. at 23, n.13, but the Department's cited authorities -- with one exception -- do not show a willingness to grant preliminary injunctions, or that Digital had a meaningful chance for any form of injunctive relief. See Bond v. Burrows, 103 Wash. 2d 153, 690 P.2d 1168 (1984) (granting only prospective relief); General Motors Corp., supra (reversing grant of permanent injunctive and refund relief to taxpayer); B.F. Goodrich Co., supra (granting permanent injunctive relief to taxpayer). The exception is Pacific Tel. & Tel. Co. v. State Tax Comm'n, 180 Wash. 673, 42 P.2d 420 (1935), and the precedential force of that case was effectively nullified by the 1982 Tyler Pipe decision. See Tyler Pipe, 638 P.2d at 1216.

2. No Meaningful Relief Under the Washington Declaratory Judgment Act, Absent the Effective Availability of Preliminary Injunctive Relief. The Department's invocation of the state declaratory relief act, RCW Chapter 7.24, is inexplicable. See Br. Opp. at 23, n.13. The Department offers no explanation how a declaration of relief, without an accompanying grant of preliminary injunctive relief, would amount to anything but another form of refund suit in which Digital would still have to pay the disputed taxes pendente lite. In fact -- and as the Department's own authorities confirm -- taxpayer declaratory suits generally combine a request for declaratory and injunctive relief. See, e.g., Great Northern Ry. Co. v. Cohn, 3 Wash. 2d 672, 101 P.2d 985 (1940), cited by Br. Opp. at 23, n.13. Yet, as shown, Digital had no realistic prospect of receiving preliminary injunctive relief.[12]

D. The Department Offers No Defense of the Legislature's After-the-Fact Restriction of Remedies, in Light of This Court's Due Process Clause Precedents.

The Department asserts Digital claims Reich and Reynoldsville have overruled "the McKesson line of cases." Br. Opp. at 22, 23. Digital has *never* made such a claim. The Department also asserts this Court would "have" to address the Department's argument in favor of continuing to give only prospective application to Tyler Pipe, if this Court grants the

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[12]In the fourth paragraph of footnote 13, found on page 24 of the Department's brief, the Department also asserts that RCW 82.32.190 "authorizes the Department of Revenue to stay the collection of tax 'from any taxpayer or group of taxpayers when a question bearing on their liability for tax' is 'pending in the courts[.]'" (edits the Department's). The Department offers not one example of when it has exercised its entirely discretionary authority under this statute, to relieve a taxpayer of the usual duty to pay first, then sue. Moreover, the Department does not acknowledge that its own regulations establish that relief will not be granted unless the Department determines "it is in the best interests of the state" to grant such relief. Reply App. 78a (WAC 458-20-228(8)(c)). Yet, the Department has historically and consistently maintained that maximum revenue collection is in the best interests of the State. The implication made by the Department in this case, that Washington taxpayers have numerous, realistic opportunities for predeprivation stays of the obligation to pay disputed taxes, is contradicted by the Department's historic practices; the Department's contrary implications are redolent of the Georgia Supreme Court's actions that this Court condemned in Reich.

petition. Br. Opp. at 27. This Court does not "have" to address an issue that the Department could have, but did not, raise by cross-petition.[13] Besides these two points (and the claim that Digital had an adequate predeprivation remedy), the Department offers no response to the substantive reasons Digital set forth for granting the writ.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

May 28, 1997

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[13]While this Court will consider alternative grounds for affirmance even when rejected by a lower court, this Court will not do so when the Respondent has failed to cross-petition, and affirmance on the alternative ground would expand the Respondent's rights as established by the judgment. E.g., Gran Financeria, S.A. v. Nordberg, 492 U.S. 33, 38-40 (1989). Here, the Department's rights would be expanded by affirmance on its proffered prospectivity ground, because the Department could then refuse retrospective relief to those parties who now qualify for credits for pre-Tyler Pipe taxing periods, under the authority of the Washington Supreme Court's decision in this case. The Department also makes no attempt to show, in light of Harper and related authority, how the Washington Supreme Court's decision to give retroactive effect to Tyler Pipe warrants this Court's review.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

DIGITAL EQUIPMENT CORPORATION,	)	
Plaintiff,	)	NO. 87-2-01627-4
v.	)	MEMORANDUM IN SUPPORT OF PLAINTIFF DIGITAL EQUIPMENT CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,	)	
Defendant.	)	

I. RELIEF REQUESTED

Plaintiff Digital Equipment Corporation ("Digital") files this memorandum in support of its motion for partial summary judgment. Filed simultaneously with this motion, Digital submits the Declaration of R. S. Kuraska and the Affidavit of George C. Mastrodonato with Exhibits which, together, set forth all the facts necessary for the court to render a partial summary judgment in this matter. In addition, the ultimate issue presented in this case is purely a question of law.

Digital moves for an order granting partial summary judgment in its favor in the amount of $1,706,877 (see Declaration of R. S. [p. 2] Kuraska, ¶ 7), $1,646,437 (see Declaration of R. S. Kuraska, ¶ 8), or such other amount as the court may order following an audit or other verification of Digital's records by the Defendant Department of Revenue ("Department") for the reporting periods set forth in the complaint (see Declaration of R. S. Kuraska, ¶ 10), together with an award of reasonable attorneys' fees under 42 U.S.C. §§ 1983 and 1988.

II. BACKGROUND INFORMATION

Prior to 1985, the Washington business and occupation ("B&O") tax law (chapter 82.04 RCW) contained a "multiple activities exemption" statute, RCW 82.04.440. See Exhibit A. Under RCW 82.04.440, Washington extractors and manufacturers that paid "extracting" (RCW 82.04.230) or "manufacturing" (RCW 82.04.240) B&O taxes in Washington were allowed an exemption from the payment of "selling" (i.e., "wholesaling" (RCW 82.04.270) or "retailing" (RCW 82.04.250)) B&O taxes for goods sold at wholesale or retail in this state.

At the time, the multiple activities exemption law did not allow Washington extractors or manufacturers an exemption from "extracting" or "manufacturing" B&O taxes for any selling taxes paid outside the state, nor did the law give an exemption to out-of-state extractors or manufacturers from the selling B&O taxes imposed by Washington. During this time period, Digital was an out-of-state manufacturer paying wholesaling and retailing B&O taxes to the State of Washington. See Declaration of R. S. Kuraska, ¶¶ 3, 4, and 5.

. . . . [p. 15]

to their interpretations of federal law. [Citations omitted]". Id. Thus, the federal law is the supreme law of the land and the federal law on retroactivity is expressed in decisions of the United States Supreme Court.

Here, the United States Supreme Court invalidated the Washington multiple activities statute (RCW 82.04.440) in Tyler Pipe. Federal law requires that the ruling be applied retroactively. While the Washington Supreme Court in National Can initially held in 1988 that Tyler Pipe did not apply retroactively, the United States Supreme Court's decisions in Beam

and Harper now succinctly impose such a requirement. The ruling in Tyler Pipe must be applied retroactively to grant refunds in all cases still open on direct review.

B. Digital Is Entitled To A Refund Of B&O Taxes Declared Unconstitutional In Tyler Pipe.

The taxpayers who successfully challenged Washington's B&O tax in Tyler Pipe failed to recover refunds in National Can only because the Washington Supreme Court denied retroactive application to Tyler Pipe based on Chevron. In Beam and Harper, the United States Supreme Court clearly rejected Chevron and mandated that retroactive refunds must be made in cases where the Court has declared a state tax unconstitutional. Indeed, Beam and Harper establish three things: (1) retroactive application of a decision is the normal practice; (2) unless a United States Supreme Court decision specifically reserves the issue of retroactivity, lower courts must interpret the decision as having retroactive effect; and (3) because prospective application of a decision would [p. 16] give retroactive benefit to no one, any discussion of remedies in a United States Supreme Court decision

must be interpreted as acknowledgement that the decision has retroactive effect for everyone.

The Harper Court noted that a majority of the justices in Beam agreed "that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law". Beam, 125 L. Ed. 2d, at 86. The Harper Court acknowledged that Beam "did not produce a unified opinion", but:

> In announcing the judgment of the Court, Justice Souter laid down a rule for determining the retroactive effect of a civil decision: After the case announcing any rule of federal law has "appl[ied] that rule with respect to the litigants" before the court, no court may "refuse to apply [that] rule . . . retroactively." Id., at _ (slip op., at 9) (opinion of Souter, J., joined by Stevens, J.). Justice Souter's view of retroactivity superseded "any claim based on a Chevron Oil analysis." Ibid. Justice White likewise concluded that a decision "extending the benefit of the judgment" to the winning party "is to be applied to other litigants whose cases were not final at the time of the [first] decision." Id., at __ (slip op., at 1) (opinion concurring in judgment). Three other Justices agreed that "our judicial responsibility . . . require[es] retroactive application of each . . . rule we announce." Id. at (slip op., at 2). . . . (Emphasis supplied.)

The Court went on to state:

> Beam controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in Beam: When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events [p. 17] predate or postdate our announcement of the rule. (Emphasis supplied.)

Harper, 125 L. Ed. 2d at 86.

The Washington Supreme Court has even recognized the United States Supreme Court's analysis and holdings in Beam and Harper. In a recent decision, Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992) (Exhibit M), the Washington Supreme Court acknowledged that "the United States Supreme Court has recently limited the Chevron Oil Co. v. Huson, supra, rule regarding retroactive application in the case of James B. Beam Distilling Co. v. Georgia, [citations omitted]." Robinson at 73.

Thus, the federal law on retroactivity is as announced by the United States Supreme Court in Beam and Harper. In

Robinson, the Washington Supreme Court recognized this new federal rule of retroactivity as the current state of the law in this state as well.

C. The National Can and American National Can Cases Are Not Controlling.

1. National Can.

The Washington Supreme Court in Robinson recognized that the Chevron test relied on in National Can, is no longer valid. The court specifically found:

> While our decision in National Can relied in part on the Chevron Oil analysis, we now modify our rule from National Can in a manner consistent with the limitations on the Chevron Oil rule effected in Beam Distilling.

Robinson, supra at 77. It follows that the ruling denying retroactive B&O tax refunds in National Can is not authority for [p. 18] denying such refunds to Digital. Again, as the United States Supreme Court explained in Harper: "[T]he legal imperative 'to apply a rule of federal law retroactively after the case announcing the rule has already done so' must 'prevai[l] over any claim based on a Chevron Oil analysis.'" Harper, 125 L. Ed.

2d at 87. In the wake of Beam and Harper, the Due Process Clause of the United States Constitution requires retroactive relief for Washington taxpayers "whose cases are still open on direct review." Id., at 86. Digital's case, still pending in Thurston County Superior Court, is one of those "cases . . . still open on direct review". Id.

In short, the recent United States Supreme Court decisions in Beam and Harper have made the Washington Supreme Court's prior non-retroactivity ruling in National Can obsolete. Since Digital's case is a matter "still open on direct review", Digital is entitled to a refund of B&O taxes paid prior to the enactment of the 1987 credit law.

2. American National Can.

The Washington Supreme Court's decision in American National Can is likewise not controlling. The court in American National Can held that the 1987 and 1985 credit or exemption laws were to be read together to remedy the constitutional deficiencies found in Tyler Pipe. Citing section 3 of the 1987 credit law, the court found the legislature had intended to retroactively apply the act's credit scheme in the event a court

determined relief was appropriate for any periods prior to the act's effective date. [p. 19] American National Can, supra, at 250. The court went on to hold that Tyler required some relief to taxpayers for the interim period[7] but limited the relief to the credits provided under the 1985 and 1987 credit laws.

The taxpayers in American National Can, however, did not raise the Supremacy Clause arguments upon which the United States Supreme Court decided Harper. Nor did the taxpayers challenge the interpretation of RCW 82.04.440 or the Department's selection of manufacturing and extracting taxes for credits. Instead, the taxpayers sought to invalidate the 1987 credit law as a violation of the Commerce Clause arguing that the state's failure to grant credits for income taxes or excise taxes paid in other states constituted discrimination against interstate businesses. The taxpayers further argued that the state's failure to give them refunds violated due process and equal protection guarantees.[8]

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[7]The six weeks between the date of the Supreme Court's Tyler Pipe decision, June 23, 1987, and the date the legislature amended RCW 82.04.440, August 11, 1987.

[8]In the American National Can case, taxpayers also challenged (continued...)

Digital does not challenge the Washington Supreme Court's decision that the 1987 credit law remedied the defects found by the United States Supreme Court in Tyler Pipe after August 11, 1987. Digital does, however, challenge the Washington Supreme Court's [p. 20] decision that the taxpayers in American National Can were only entitled to the credits provided by the 1987 credit law, and not full refunds. The United States Supreme Court's rulings in Beam and Harper cast serious doubt on the validity of this Washington Supreme Court retroactivity analysis and holding that taxpayers were not entitled to full refunds for the interim period after Tyler Pipe. In fact, the Washington Supreme Court, in the course of its analysis, actually established the deficiency of the credit as a remedy under Beam and Harper.

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[8](...continued)
the retroactive application of the credits on separation of powers grounds. The Washington Supreme Court summarily dismissed this argument stating, "(S)tate law governs the relationship between the Washington legislature and its courts. Accordingly, our discussion rests entirely upon our independent opinion of the requirements of the Washington State Constitution. . . . Federal law does not compel the results reached in this case." American National Can, at 252.

In analyzing the credit allowed under the 1987 credit law, the Washington Supreme Court specifically found that the $1,304,000 worth of credits applied for by taxpayers under the 1987 credit law was a "small fraction" of the total taxes actually collected. The court dismissed the inequality, however, by stating that the fact businesses had applied for $1,304,000 in credits" . . . proved beyond a shadow of a doubt that the new law had a practical effect". American National Can, supra, at 247-248. The court thus dismissed the taxpayers' argument as merely a complaint about the magnitude of the credits' effect.

However, the court's acknowledgement of the disparity between the amount of taxes actually collected and the amount of credits retroactively given becomes additional evidence of Digital's right to a full refund today. Obviously, this analysis shows that the Washington Supreme Court failed to envision the United States Supreme Court's subsequent decision in Harper, which [p. 21] imposes the requirement that full retroactive effect must be given to new federal rulings, like the one made in Tyler Pipe.

D. The State's Attempt To Make The 1987 Credit Law Retroactive Is Invalid.

Notwithstanding Beam and Harper, it is Digital's understanding that the Department will argue that the legislature's 1987 amendments to RCW 82.04.440 provided a remedy to taxpayers in the form of credits which were consistent with Tyler Pipe, and that the legislature could, as a matter of state law, make the remedy applicable retroactively. However, this argument does not fully appreciate the requirements now imposed on states by the United States Supreme Court in Beam and Harper.

First, the United States Supreme Court invalidated Washington's multiple activities statute, RCW 82.04.440, in Tyler Pipe. Subsequently, the Court held in Beam and Harper that when it applies a rule of federal law, that rule must be given full retroactive effect to all cases open on direct review.

Second, while the United States Supreme Court in Harper refused to enter a judgment for the taxpayers, indicating that federal law did not necessarily entitle them to a refund, the Court specifically stated that the Supremacy Clause does not allow a state to supplant the federal retroactivity doctrine through state

law. Rather, the Supreme Court held that the Constitution required the state, in this case Virginia, to fashion the appropriate remedy for taxpayers. The Court then set forth the standards for determining the constitutional sufficiency of any remedy to be adopted by Virginia. [p. 22]

The United States Supreme Court held that the constitutionally sufficient remedy turned initially on an assessment of whether taxpayers had been offered a meaningful opportunity to withhold the contested tax assessments and to challenge the validity of the assessments in a predeprivation hearing.[9] If no such predeprivation remedy existed, as in the state of Washington (Id.), the Due Process Clause of the Fourteenth Amendment obligated the state to provide meaningful backward looking relief to rectify any unconstitutional deprivation. McKesson, 496 U.S. 18, 39-40. In providing such relief, the state could either award full refunds to those burdened by an unlawful tax, or issue some other order creating "in hindsight a non-discriminatory scheme". Harper, 125 L. Ed. 2d, at 89 citing McKesson, supra, and Davis, 489 U.S.

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[9]See fn. 4, supra.

at 818. Finally, the Court cautioned that although a state law could provide relief beyond the demands of federal due process, under no circumstances could a state law confine taxpayers to a lesser remedy. Harper, 125 L. Ed. 2d, at 89.

In this case, there is no question that the United States Supreme Court in Tyler Pipe found that Washington's multiple activities exemption statute discriminated against interstate commerce. There is also no question that the Washington Supreme Court in National Can and American National Can refused to provide taxpayers with full refunds of the unconstitutionally assessed B&O taxes at issue here, based on the now-erroneous retroactive [p. 23] application of the 1987 credit law. (This remedy is no longer tenable under the federal retroactivity law established by Beam and Harper.) And finally, there is no question that the Washington Supreme Court found the 1987 credit law provided taxpayers a credit representing only a small fraction of the total taxes collected under the previous unconstitutional provision.[10]

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[10]In fact, Digital has received no credits. See Declaration of R. S. Kuraska, ¶ 9.

To comply with Harper, the state must either (1) award full refunds to those burdened by an unlawful tax or (2) issue some other order that creates, in hindsight, a non-discriminatory scheme. Harper, 125 L. Ed. 2d at 89. To comply with Harper, the remedies adopted by the state must be substantially equivalent. Since the retroactive application of the 1987 credit law provides for a significantly lesser credit rather than a full refund to affected taxpayers, the state has not complied with either of the rules set forth in Harper. Additionally, Harper clearly requires a "full refund" so that even if a credit is determined to be the same as a refund, the credit provided is not the equivalent of what taxpayers would have received with full refunds. This was even conceded by the Washington Supreme Court in American National Can.

Nor has Washington complied with the second option by creating in hindsight a non-discriminatory scheme. The fact that RCW 82.04.440 attempts to retroactively provide a credit for a small fraction of the taxes actually paid does not relieve the state of its obligation to create a non-discriminatory remedy. A [p. 24] non-discriminatory credit could only result if the credit was

equal to the full amount of tax paid under the unconstitutional provision.

Consistent with Harper, the state of Washington could have fashioned a remedy that would have provided a credit equal to the amount of tax unconstitutionally paid, or set up a scheme under which the state could have retroactively imposed an equal assessment on intrastate manufacturers. It has not done either. In sum, state law cannot meet the demands of federal due process by confining interstate manufacturers, like Digital, to a lesser remedy.

E. Digital Is Entitled To A Refund of B&O Taxes Paid For All Periods Open Under The Statute of Limitations (RCW 82.32.060) Prior To The Date Of The Enactment Of The 1987 Credit Law.

Beam held that once the Supreme Court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata.[11] The applicable statute of limitations in the case of

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[11]The doctrine of res judicata is not relevant because this case has been pending since 1987.

tax refunds is RCW 82.32.060(1). It provides in pertinent part as follows:

> If, upon receipt of an application by a taxpayer for a refund . . . it is determined by the department that within the statutory period for assessment of taxes, penalties, or interest prescribed by RCW 82.32.050 any amount of tax, penalty, or interest has been paid in excess of that properly due, the excess amount paid within, or attributable to, such period shall be credited to the taxpayer's account or shall be refunded to [p. 25] the taxpayer, at the taxpayer's option. Except as provided in subsections (2) and (3) of this section, no refund or credit shall be made for taxes, penalties, or interest paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

Here, Digital filed a petition for refund in Thurston County Superior Court in August, 1987. Under RCW 82.32.050, Digital is entitled to a refund of the B&O taxes paid in violation of the Commerce Clause of the United States Constitution from January 1, 1983 through August 11, 1987, the date prior to the effective date of the 1987 credit law.[12]

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[12]The 1987 credit law was declared constitutional by the (continued...)

F. Digital Is Entitled To Recover Its Costs and Reasonable Attorneys Fees Under 42 U.S.C. §§ 1983 and 1988.

In Dennis v. Higgins, 498 U.S. 439, 112 L. Ed. 2d 969, 111 S. Ct. 865 (1991), the United States Supreme Court ruled that suits for violations of the United States Constitution (here, the Commerce Clause) may be brought under 42 U.S.C. § 1983, and persons injured by state action that violates rights guaranteed by the Constitution may obtain injunctive and declaratory relief, ...

. . . .

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[12](...continued)
Washington Supreme Court in American National Can Corporation v. Department of Revenue, 114 Wn.2d 236, 787 P.2d 545 (1990). The amended law was also applied retroactively to the interim period between the date of the United States Supreme Court's decision in Tyler Pipe (June 23, 1987) and the date the 1987 credit law became effective (August 11, 1987). As previously argued, Beam and Harper place into question this portion of the American National Can decision. Due to the short time frame of the interim period (six weeks), if this court should find that the 1987 credit law does relate back to the date Tyler Pipe was decided, then DEC's refund will cover the period January 1, 1983 through June 23, 1987. The Declaration of R. S. Kuraska sets forth the refund requested for this period. See ¶ 8.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

DIGITAL EQUIPMENT CORPORATION, Plaintiff, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Defendant.	NO. 87-2-01627-4 DIGITAL EQUIPMENT CORPORATION'S RESPONSE TO DEPARTMENT OF REVENUE MEMORANDUM IN IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Digital Equipment Corporation ("Digital") filed a motion for partial summary judgment under CR 56 against the Department of Revenue ("Department") on April 11, 1994. In its motion, Digital alleged that there were no genuine issues of material fact and, as a consequence, was entitled to partial summary judgment as a matter of law.

The Department subsequently filed a cross-motion for summary judgment on April 18, 1994, also alleging there were no

genuine issues of material fact in the case and that it was entitled to a judgment as a matter of law.

Digital submits this memorandum in response to the Department's cross-motion for summary judgment.

. . . . [p. 27]

. . . requirements of federal due process of law. Under federal due process requirements, the retroactive application of the 1987 credit law results in a denial of due process since it denies taxpayers a full refund on the basis that the statute at issue in Tyler Pipe was unconstitutional. Indeed, in American National Can, the court acknowledged that the credits allowed under the 1987 credit law were a "small fraction" of the total taxes actually collected, but dismissed taxpayers' arguments as "merely a complaint about the magnitude of the credits' effect". Id., at 247-248. Thus, the court held Tyler Pipe to be limited to prospective relief only. The Department's current reliance on American National Can is, at best, tenuous. The 1987 credit law may have been constitutional on its face, but after the court's decision in American National Can, the law must be held unconstitutional as applied.

Further, it may be that the state could, on a prospective basis, design a tax scheme that meets minimum federal due process requirements, but when applied retroactively, does not meet such due process requirements because the scheme provides less than full refunds or credits to affected taxpayers. This would be the result of giving full retroactive effect to the 1987 credit law. The requirements of federal due process under an unconstitutional tax system are clearly not met by these minimum requirements. Instead, federal law mandates full refunds, or the equivalent, during the period in which the law was declared to be unconstitutional.

In summary, Digital is entitled to either a full refund . . . .

. . . .

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

DIGITAL EQUIPMENT CORPORATION,	)	
Plaintiff,	)	NO. 87-2-01627-4
v.	)	MOTION FOR RECONSIDERATION
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,	)	AND SUPPORTING MEMORANDUM
Defendant.	)	

I. RELIEF REQUESTED

Plaintiff Digital Equipment Corporation ("Digital"), by and through its attorneys George C. Mastrodonato and Lane Powell Spears Lubersky, moves this court for reconsideration of the court's September 9, 1994 Opinion Letter, and declares:

A. Digital is entitled to a refund of Business and Occupation ("B&O") taxes paid to the defendant, Department of Revenue ("Department"), during the period January 1, 1983 through August 11, 1987, under the United States Supreme Court's ruling in Tyler Pipe Industries, Inc., et al. v. Washington

Department of Revenue, 483 U.S. 232, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987) . . . .

. . . . [p. 11]

. . . Beam, 111 S. Ct., at 2447. So, the court's concern over the fact that Digital may obtain a B&O tax refund where, under similar or identical circumstances National Can and former litigants failed, resulting "in opposite treatment for two similarly situated litigants . . . with the original litigant . . . getting the decidedly short end of the legal stick", is wholly inconsistent with the Court's ruling in Beam.[1]

C. After Harper The Only Situation That Might Preclude Retroactive Refunds To Taxpayers Who Paid An Unconstitutional State Tax Is If The State Provided A Predeprivation Process That Satisfied Federal Due Process Guidelines.

"Harper's major effect on subsequent cases is the Court's holding that its application of a rule of federal law shall be given retroactive effect in all future cases. Harper, . . . 113 S. Ct.,

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[1]In its Opinion Letter, the court primarily relies on Tyler Pipe, National Can II and American Trucking Assoc., Inc. v. Scheiner, 483 U.S. 266, 97 L. Ed. 2d 226, 107 S. Ct. 2829 (1987), to support its ruling. Tyler Pipe, National Can II and Scheiner were all cases decided prior to Beam and Harper.

at 2513. See United Food and Commercial Workers Int'l Union AFL-CIO, Local No. 150-A v. NLRB, 1 F.3d 24, 35 (D.C. Cir. 1993)." Cambridge State Bank and Norwest Bank Duluth, National Association, et al. v. John P. James, et al., 514 N.W. 2d 565, 568, n. 5 (1994).[2] But, because a rule of federal law must be given retroactive effect, this does not necessarily entitle a taxpayer to [p. 12] a refund. Harper, 113 S. Ct., at 2519. Instead, the Constitution requires a state like Washington

> . . . "to provide relief consistent with federal due process principles." American Trucking, 496 U. S., at 181, 110 S. Ct., at 2332 (plurality opinion). Under the Due Process Clause, U. S. Const., Amdt. 14, § 1, "a State found to have imposed an impermissibly discriminatory tax

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[2]In this case, the Minnesota state supreme court, observing that Harper permits a state to deny aggrieved taxpayers a retroactive remedy only if it affords them a meaningful predeprivation remedy, held that Minnesota had not afforded banks a predeprivation remedy sufficient to satisfy the McKesson federal due process standards because the question of whether a Minnesota taxpayer could pose a constitutional challenge to a state tax without first paying the contested tax was unsettled at the time the banks filed their suit and, thus, at the time the banks initiated their suit, the only certain remedy available was the tax refund statute under which they proceeded. A petition for certiorari has been filed with the United States Supreme Court and is pending in this case. Norwest Bank Duluth and Cambridge State Bank et al., U.S. Supreme Court, Docket No. 94-331, petition for certiorari filed August 22, 1994.

> retains flexibility in responding to this determination." McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U. S. 18, 39-40, 110 S. Ct. 2238, 2251-2252, 110 L. Ed. 2d 17 (1990). If Virginia "offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing," the "availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause." Id., at 38, n. 21, 110 S. Ct., at 2251, n. 21. On the other hand, if no such predeprivation remedy exists, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." Id., at 31, 110 S. Ct., at 2247 (footnotes omitted). In providing such relief, a State may either award full refunds to those burdened by an unlawful tax or issue some other order that "create[s] in hindsight a nondiscriminatory scheme." Id., at 40, 110 S. Ct., at 2252. Cf. Davis, 489 U.S., at 818, 109 S. Ct., at 1509 . . .

Harper, 113 S. Ct., at 2519-2520. Thus, McKesson held that a state may choose to provide taxpayers with either a predeprivation or postdeprivation procedure.[3]

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[3]"A predeprivation procedure must allow taxpayers to sue to enjoin imposition of the tax prior to payment or to withhold payment and present their objections as defenses in a tax enforcement proceeding. . . . [A] postdeprivation procedure, however, . . . must provide one of the following 'clear and certain' remedies: a refund of taxes unlawfully exacted, a retroactive tax on the benefitted taxpayers, or a combination of a

(continued...)

> Harper holds that the existence of a predeprivation remedy which meets the tests set out in McKesson is a preliminary question which determines the remedy required for an unlawful tax under the Due Process Clause of the federal constitution. Harper, --- U. S. at ---, 113 S. Ct. at 2519. . . . [A]fter Harper the existence of a meaningful predeprivation remedy is a necessary [p. 13] precondition to denying a retroactive remedy on any state law theory.

Cambridge State Bank, 514 N.W. 2d, at 569. Thus, if there was a meaningful predeprivation procedure in Washington at the time Digital paid the B&O taxes in question, then this court may deny backward-looking (retroactive) relief. On the other hand, if those procedures did not exist or were not "meaningful" then the court must design a "clear and certain" backward-looking remedy which creates in hindsight a non-discriminatory tax scheme. See Cambridge State Bank, 514 N.W.2d, at 568.[4]

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[3](...continued)
partial refund and a partial retroactive assessment to create "in hindsight a nondiscriminatory scheme." Cambridge State Bank, 514 N.W.2d, at 568.

[4]The U.S. Supreme Court will hear oral arguments on October 11, 1994, in a case to decide whether Georgia provided a clear and certain remedy to federal retirees who paid state income taxes that were illegal under the doctrine of intergovernmental immunity. Reich v. Collins, 263, Ga. 602, 437
(continued...)

McKesson held that if a state chooses this latter course of action, it must provide retrospective relief upon a determination that the tax was unlawfully enacted. McKesson, 110 S. Ct., at 2251-2252. Washington did not and does not provide taxpayers with the opportunity to challenge a tax assessment in court without first paying the taxes at issue (see RCW 82.32.180), and so its predeprivation procedures do not satisfy federal due process requirements.

Between 1983 and 1987, the period during which Digital seeks a B&O tax refund, as well as today, taxpayers challenging

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[4](...continued)
S.E.2d 310 (1993). At issue in this case is whether Georgia afforded a federal military retiree sufficient predeprivation remedies to justify its denial of his request for a refund of the Georgia personal income tax that he had paid on his federal military retirement benefits. Despite its refusal to grant refunds to federal retirees, Georgia has amended its tax law to provide identical treatment for federal, state, and private pensions. After the Georgia Supreme Court (Ibid.) upheld the state's refusal of refunds, the U.S. Supreme Court remanded the case (Reich (No. 92-1276, June 28, 1993) for reconsideration in light of Harper. On remand, the Georgia court ruled that the taxpayer was not entitled to a refund because he had been given ample predeprivation remedies allowing a challenge to the tax imposed prior to payment of the tax, which satisfied federal due process requirements. (Reich, U.S. Supreme Court, Docket No. 93-908, petition for certiorari granted February 22, 1994; oral argument scheduled for October 11, 1994.)

taxes in [p. 14] Washington are able to file for tax refunds in Superior Court, but are required to pay the taxes first. RCW 82.32.180.[5] Further, RCW 82.32.150 allows taxpayers the opportunity to seek injunctions against the state in tax cases involving constitutional claims. But, as argued in Digital's Reply To Department's Memorandum In Opposition To Motion For Partial Summary Judgment (see Section IV) and Response To Department Of Revenue Memorandum In Support Of Cross-Motion For Summary Judgment (see Section IV., B., 1.), the Department vigorously opposes such requests. See Tyler Pipe Industries v. Department of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982) (A taxpayer seeking an injunction against the state in a tax case based on constitutional grounds must not only satisfy

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[5]The state did have an administrative procedure for contesting tax assessments without first paying the contested taxes (see RCW 82.32.160 and WAC 458-20-100) but administrative bodies cannot rule on the constitutionality of statutes (Yakima Clean Air v. Glascam Builders, 85 Wn.2d 255, 534 P.2d 33 (1975)). Moreover, paying the contested taxes prior to filing a refund suit in Thurston County Superior Court is a statutory prerequisite to having the case heard outside the Department's administrative hearing process. This administrative hearing process does not provide taxpayers the "meaningful opportunity" to challenge a tax assessment in court prior to paying the disputed taxes as required by McKesson.

RCW 82.32.150, but must also meet the equitable criterion governing an injunction's issuance because "injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law" and Washington law "provides the legal remedy of a refund suit"). Thus, during the tax period in question, Washington clearly did not provide a meaningful predeprivation remedy to taxpayers paying unconstitutional taxes.

McKesson commands that the court "design a clear and certain remedy which creates in hindsight a nondiscriminatory scheme." Cambridge State Bank, 514 N. W. 2d, at 571, citing McKesson, 110 S. [p. 15] Ct., at 2251-2252. What, then, creates an in hindsight nondiscriminatory scheme? McKesson offers three choices: (1) a full refund of the unconstitutional taxes collected, (2) a retroactive tax on taxpayers exempted from the B&O tax, or (3) a combination of the two remedies. McKesson, 110 S. Ct., at 2252-2253. In reality, however, there is now only one option to Digital remaining - a full refund of the unconstitutional B&O taxes it paid between January 1, 1983 and August 11, 1987. This is so because the statute of limitations for assessments (RCW 82.32.050) against other taxpayers has expired for this period, thereby eliminating options (2) and (3) above.

If this court does not choose relief in the form of a full refund of taxes paid, the court must then fashion a remedy which satisfies "minimum federal requirements". McKesson, 110 S. Ct., at 2257-2258. This "allows relief beyond the demands of federal due process", 110 S. Ct. at 2258, N. 36, "but under no circumstances may it confine [taxpayers] to a lesser remedy", Harper, 113 S. Ct., at 2520, citing McKesson, 110 S. Ct., at 2254-2258.[6]

VI. CONCLUSION

Beam and Harper require that the Court's ruling in Tyler Pipe be applied retroactively. Equitable considerations have been negated by the Supreme Court's directives in Harper. Digital is entitled to receive a tax refund even if National Can failed in its efforts. The only factor that would deny Digital a retroactive

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[6]The Department may again argue that the B&O tax credits (see RCW 82.04.440) enacted effective August 12, 1987, satisfy federal due process requirements. However, this will confine Digital "to a lesser remedy" which is forbidden by both Harper and McKesson.

No. 62414-3

SUPREME COURT
OF THE STATE OF WASHINGTON

DIGITAL EQUIPMENT CORPORATION,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

Appeal From Thurston County Superior Court
Honorable Wm. Thomas McPhee

STATEMENT OF GROUNDS FOR DIRECT REVIEW

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. . . . [p. 11]

. . . one of the litigants in National Can II or in American National Can.

The Superior Court was also bothered by the fact that Digital might receive a refund, where the National Can II litigants did not. Beam directly disposes of this point:

> Insofar as equality drives us, it might be argued that the new rule should be applied to those who had toiled and failed, but whose claims are now precluded by res judicata; and that it should not be applied to those who only exploit others' efforts by litigating in the new rule's wake.
>
> . . . .
>
> As for the putative hangers-on, they are merely asserting a right that the Court has told them is theirs in law, that the Court has not deemed necessary to apply on a prospective basis only, and that is not otherwise barred by state procedural requirements. They cannot be characterized as freeloaders any more than those who seek vindication under a new rule on facts arising after the rule's announcement. Those in each class rely on the labors of the first successful litigant.

Beam, 111 S. Ct. at 2447. In sum, the Superior Court erred as a matter of federal law in refusing to give Tyler Pipe retroactive effect in this case.

C. Washington Does Not Afford Taxpayers Such as the Appellant an Adequate Predeprivation Remedy to Satisfy Federal Due Process, So Digital Is Entitled to Meaningful Backward-Looking Relief.

The second major issue is whether Digital is entitled to a refund of the unconstitutional taxes [p. 12] it paid to Washington. The determining factor is whether Washington law contains a predeprivation remedy that satisfies Fourteenth Amendment Due Process standards. Harper, 113 S. Ct. at 2519 (citing McKesson Corp. v. Florida Alcoholic Beverages & Tobacco Division, supra). As a matter of law, no predeprivation remedy existed under Washington law at the time Digital filed suit, nor does it now. RCW 82.32.180 required Digital to pay the contested tax and then seek a refund through the courts of the allegedly unlawful tax paid. This "pay-now-litigate-later" procedure requires "meaningful backward-looking relief" under the Due Process Clause to rectify the unconstitutional deprivation.

McKesson commands that courts "design a clear and certain remedy which creates in hindsight a nondiscriminatory scheme." See Cambridge State Bank v. James, 514 N.W.2d 565, 568 (Minn.), cert. denied, Minnesota Com'r of Revenue v.

Norwest Bank Duluth, NA., 115 S.Ct. 663 (Dec. 12, 1994) (citing McKesson, 110 S. Ct. at 2251-52). Under this mandate a state has three options: (1) a full refund of the unconstitutional taxes collected, [p. 13] (2) a retroactive tax on taxpayers exempted from the tax, or (3) a combination of the two remedies. McKesson, 110 S. Ct. at 2252-53. Digital's case presents only one option -- a full refund of the unconstitutional B&O taxes it paid because the statute of limitations for assessments (RCW 82.32.050) against other taxpayers has expired for this period, thereby eliminating options (2) and (3).

The Department will undoubtedly argue that the B&O tax credits enacted effective August 12, 1987 (see RCW 82.04.440) satisfy federal due process requirements. However, this will confine Digital "to a lesser remedy," which is forbidden by Harper. See 113 S. Ct. at 2520 (citing McKesson, 110 S. Ct. at 2254-58). The flaw in the Department's argument was made clear by the Supreme Court's latest decision, in the Reich case. There, Georgia had taxed retirement benefits paid by the Federal Government but exempted those paid by the State, until the U.S. Supreme Court held in Davis v. Michigan, 489 U.S. 803, 103 L.

Ed. 2d 891, 109 S. Ct. 1500 (1989), that such a scheme violated the Constitution. After Davis, Georgia repealed its [p. 14] statute but did not offer federal retirees refunds of the unconstitutional taxes they had paid before the Davis decision. In ordering meaningful backward-looking relief (presumably refunds), the Supreme Court stated less than two months ago:

> . . . [U]nder McKesson, Georgia has the flexibility to maintain an exclusively predeprivation remedial scheme, so long as that scheme is "clear and certain." Due process, we should add, also allows the State to maintain an exclusively postdeprivation regime, see, e.g., Bob Jones Univ. v. Simon, 416 U.S. 725, 746-748 . . . (1974), or a hybrid regime. A State is free as well to reconfigure its remedial scheme over time, to fit its changing needs. Such choices are generally a matter only of state law.
>
> But what a State may not do, and what Georgia did here, is to reconfigure its scheme, unfairly, in mid-course -- to "bait and switch," as some have described it. Specifically, in the mid-1980's, Georgia held out what plainly appeared to be a "clear and certain" postdeprivation remedy, in the form of its tax refund statute, and then declared, only after Reich and others had paid the disputed taxes, that no such remedy exists. In this regard, the Georgia Supreme Court's reliance on Georgia's predeprivation procedures was entirely beside the point (and thus error), because even assuming the constitutional adequacy of these procedures -- an issue on which we express no review -- no reasonable taxpayer would have thought that they represented, in light of the apparent applicability of the refund statute, the exclusive remedy for unlawful taxes. See generally Rakowski, Harper and Its Aftermath, 1 Fla. Tax Rev. 445, 474 (1993).

[p. 15] Reich, 115 S. Ct. at 550. This is precisely the effect the 1987 credit law would have on Digital's refund claim. Digital paid B&O taxes to Washington prior to August 12, 1987, pursuant to an unconstitutional scheme. Washington then amended the statute to correct the Commerce Clause violation, but has rejected taxpayers' requests for refunds arguing that taxpayers are entitled only to the credits under the 1987 credit law. Washington thus reconfigured its scheme, unfairly, in mid-course, to "bait and switch," which is precisely what Reich forbids.

V.

CONCLUSION

This case involves a matter of substantial public import, over which this Court should exercise its authority of direct review.

DATED this 31st day of January, 1995.

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No. 62414-3

SUPREME COURT
OF THE STATE OF WASHINGTON

DIGITAL EQUIPMENT CORPORATION,

Plaintiff/Appellant

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Defendant/Respondent

Appeal From Thurston County Superior Court
Honorable Wm. Thomas McPhee

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

1. The Superior Court erred when it granted a summary judgment dismissing the claim of Plaintiff/Appellant Digital Equipment Corporation ("Digital"), for a refund of Washington Business and Occupation ("B&O") taxes paid between January 1, 1983 and June 23, 1987, and from June 23, 1987 to August 11, 1987. See Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Reconsideration (Nov. 18, 1994) at 4 (CP 236).

2. The Superior Court erred when it denied Digital's motion for reconsideration. Id.

STATEMENT OF ISSUES

The following issues pertain to the Assignments of Error:

1. Retroactivity of the United States Supreme Court's Ruling in TYLER PIPE INDUSTRIES, INC. V. WASHINGTON DEPARTMENT OF REVENUE, 483 U.S. 232 (1987). Whether, under the federal rule governing retroactivity of U.S. Supreme Court decisions, as established by the Supreme Court's decisions in James Beam Distilling Co. v. Georgia, 501 U.S. 529, 115 L. Ed. 2d 481, 111 S. Ct. 2439 [p. 2](1991), and Harper v. Virginia

Dept. of Taxation, ___ U.S. ___, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993), the Superior Court erred in refusing to give retroactive effect to the decision of the Supreme Court in Tyler Pipe Indus., Inc. v. Department of Revenue, 483 U.S. 232, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987). (Assignments of Error Nos. 1 & 2.)

2. Meaningful Remedy for Taxpayers Under Washington Law for Taxes Collected in Violation of the U.S. Constitution. Whether Washington law provides a taxpayer like Digital with meaningful relief that satisfies federal due process requirements as established by the Supreme Court's decisions in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 L. Ed. 2d 17, 110 S. Ct. 2238 (1990), and Reich v. Collins, ___ U.S. ___, 130 L. Ed. 2d 454, 115 S. Ct. 547 (1994), if Digital is denied a refund of taxes that were collected in violation of the Commerce Clause of the U.S. Constitution. (Assignments of Error Nos. 1 & 2.) [p. 3]

I.

INTRODUCTION

The core issue in this case is whether Plaintiff/Appellant Digital Equipment Corporation ("Digital"), which paid taxes to the State of Washington which should not have been collected because they were prohibited by the Commerce Clause of the U.S. Constitution, is entitled to a refund of those taxes. The taxes in question are Business and Occupation ("B&O") taxes that were struck down by the U.S. Supreme Court in Tyler Pipe v. Department of Revenue, 483 U.S. 232, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987) ("Tyler Pipe"), as impermissibly discriminatory against interstate commerce under the Commerce Clause (U.S. Constitution, Article I, Section 8). The Court in Tyler Pipe, however, did not go on to specify the remedy for the taxpayers in that case; instead, consistent with the general principle that the question of relief is properly addressed in the first instance by the state courts, the Supreme Court remanded the case to this Court to decide the "refund issues" raised by its ruling. Tyler Pipe, 483 U.S. at 252. On remand, this Court applied the [p. 4] holding in Tyler Pipe prospectively only, and denied a refund. See National

Can Corp. v. Revenue, 109 Wn.2d 878, 749 P.2d 1286 (1988) ("National Can II"). This Court held that whether Tyler Pipe should be given retroactive effect was governed by the test set forth by the U.S. Supreme Court's decision in Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971) ("Chevron Oil"); based on that test, this Court denied a refund.[1] The Supreme Court then declined to review this decision. See order denying the taxpayers' petition for a writ of certiorari, reported at 486 U.S. 1040, 100 L. Ed. 2d 615, 108 S. Ct. 2030 (1988). [p. 5]

After this Court decided National Can II, the U.S. Supreme Court repudiated the Chevron Oil approach and embraced the full retroactivity standard set forth in Griffith v. Kentucky, 479

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[1]"Chevron Oil . . . sets out the three factors to be considered in deciding whether to give retroactive or prospective effect to a new rule in a federal civil case. . . . Courts must (1) determine whether the decision establishes a new principle of law either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation; and (3) weigh the inequity imposed by retroactive application. Chevron Oil, at 106-07." National Can II, 109 Wn.2d at 881.

U.S. 314, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987). See James Beam Distilling Co. v. Georgia, 501 U.S. 529, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991) ("Beam"); Harper v. Virginia Dept. of Taxation, ___ U.S. ___, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993) ("Harper"). Moreover, in tandem with the adoption of full retroactivity, the Court held that the Due Process Clause of the Fourteenth Amendment requires a state to provide a meaningful remedy for taxpayers who pay taxes that later are established to violate a constitutional prohibition. See McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18, 110 L. Ed. 2d 17, 110 S. Ct. 2238 (1990) ("McKesson"); Reich v. Collins, ___ U.S. ___, 130 L. Ed. 2d 454, 115 S. Ct. 547 (1994) ("Reich"). In the last of these cases (decided at the start of the October 1994 Term), the Court held that a state cannot avoid the obligation to refund illegally assessed taxes by reconfiguring the remedy in mid-course. Reich, 115 S. Ct. at 550. [p. 6]

In sum, not only is Tyler Pipe to be given retroactive effect, but due process also forbids a state from first requiring a taxpayer to pay a tax under a scheme that provides for full refunds of a tax later declared invalid, and then turning around and

declaring that this remedy no longer exists after the taxpayer has complied with the payment requirement and prevailed in a subsequent court challenge to the assessment's legality. Here, Digital complied with the payment requirements of RCW Chapter 82.32, for taxes declared invalid in Tyler Pipe. Accordingly, the Superior Court erred in denying Digital its refund.

The Washington statute found unconstitutional in Tyler Pipe was former RCW 82.04.440, the "multiple activities exemption." Washington's B&O multiple activities exemption law was originally challenged in 1984. More than eight years have now passed since the U.S. Supreme Court in Tyler Pipe held Washington's B&O tax to be unconstitutional, yet no taxpayer has received a refund of the taxes which Tyler Pipe declared illegally assessed. Beam, Harper, McKesson and Reich, decided by the Supreme Court after this Court's ruling in National [p. 7] Can II, have clarified the federal law on retroactivity and also established the due process requirements for meaningful remedies in successful taxpayer challenges to the constitutionality of state taxes. In light of these decisions, this Court should reverse the judgment of the Superior Court, and order that Digital receive a refund.

II.

STATEMENT OF FACTS

A. Background.

Digital is a Massachusetts corporation which was founded in 1957. (CP 46.) Digital designs, manufactures, sells and services computers, associated peripheral equipment, and related software and supplies. Id. Its products are used worldwide in a wide variety of applications and programs. Id. During the period in question, i.e., January 1, 1983, through August 11, 1987, Digital manufactured all parts, components and products outside the state of Washington and made sales to end-users (consumers), as well as to persons who resold the goods (wholesalers) in this state. (CP 47.)

. . . . [p. 26]

B. Washington Does Not Provide Taxpayers That Pay an Unconstitutional State Tax a Predeprivation Process That Satisfies Federal Due Process Guidelines, and Therefore Washington Must Give Digital a Refund.

Since Tyler Pipe is to be applied retroactively to Digital, the next inquiry is whether Digital is entitled to a refund of the unconstitutional taxes it paid. As shown, Beam and Harper

establish that a U.S. Supreme Court decision shall be given retroactive effect, absent an express reservation by the decision at issue. See Cambridge State Bank v. James, 514 N.W.2d 565, 568 n.5 (Minn.), cert. denied sub nom. Minnesota Comm'r of Revenue v. Norwest Bank Duluth, N.A., ___ U.S. ___, 130 L. Ed. 2d 598, 115 S. Ct. 663 (1994). Digital would agree that, merely because a rule of federal law must be given retroactive effect to invalidate a state tax collection, a taxpayer who successfully challenges that collection is not necessarily entitled to a refund of the illegally collected tax. Instead:

> Harper holds that the existence of a predeprivation remedy which meets the tests set out in McKesson is a preliminary question which determines the remedy required for an unlawful tax under the Due Process Clause of the federal constitution. Harper, --- U.S. at --- 113 S. Ct. at 2519. . . . [A]fter Harper the existence of a meaningful predeprivation [p. 27] remedy is a necessary precondition to denying a retroactive remedy on any state law theory.

Cambridge State Bank, 514 N.W.2d at 569.

McKesson established the approach for determining whether a remedy passes due process muster. As the Court explained in Harper, under McKesson a state must:

> ". . . provide relief consistent with federal due process principles." American Trucking, 496 U.S., at 181, 110 S.

> Ct., at 2332 (plurality opinion). Under the Due Process Clause, U.S. Const., Amdt. 14, § 1, "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 39-40, 110 S. Ct. 2238, 2251-2252, 110 L. Ed. 2d 17 (1990). If Virginia "offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing," the "availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause." Id., at 38, n.21, 110 S. Ct., at 2251, n.21. On the other hand, if no such predeprivation remedy exists, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." Id., at 31, 110 S. Ct., at 2247 (footnotes omitted). In providing such relief, a State may either award full refunds to those burdened by an unlawful tax or issue some other order that "create[s] in hindsight a nondiscriminatory scheme." Id., at 40, 110 S. Ct., at 2252. Cf. Davis, 489 U.S., at 818, 109 S. Ct., at 1509 . . .

Harper, 113 S. Ct. at 2519-20. In other words, one must first determine whether the state has chosen [p. 28] to provide taxpayers with a predeprivation or postdeprivation procedure, and then determine whether that procedure satisfies the requirements of due process.[9]

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[9]"A predeprivation procedure must allow taxpayers to sue to enjoin imposition of the tax prior to payment or to withhold payment and present their objections as defenses in a tax (continued...)

Between 1983 and 1987, the period during which Digital seeks a refund, Washington did not provide taxpayers a predeprivation remedy that satisfied Fourteenth Amendment due process standards. The scope of the remedy available in tax cases such as these was set forth in RCW Chapter 82.32 and required a Washington taxpayer to pay a disputed tax and then seek a refund through the courts. Thus, between 1983 and 1987, taxpayers challenging taxes in Washington were required to pay the taxes first and then file for a refund in Superior Court. RCW 82.32.180.[10] This procedure did not provide a [p. 29]

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[9](...continued)
enforcement proceeding. . . . [A] postdeprivation procedure, however, . . . must provide one of the following 'clear and certain' remedies: a refund of taxes unlawfully exacted, a retroactive tax on the benefitted taxpayers, or a combination of a partial refund and a partial retroactive assessment to create "in hindsight a nondiscriminatory scheme." Cambridge State Bank, supra, 514 N.W.2d at 568.

[10]RCW 82.32.150 also provides taxpayers the opportunity to seek injunctions against the state in tax cases involving constitutional claims. But the Department vigorously opposes such requests, and this Court has made such injunctions all but impossible to obtain. See Tyler Pipe Industries v. Department of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982). Indeed, this Court has held that a taxpayer seeking an injunction against the state in a tax case based on constitutional grounds must not only
(continued...)

predeprivation remedy to Digital or other taxpayers which satisfied the due process requirements established under McKesson.

Because Washington did not provide a meaningful predeprivation remedy to taxpayers, Washington is now required by McKesson to provide a constitutional postdeprivation remedy, i.e., [p. 30] "meaningful backward-looking relief," to rectify the unconstitutional deprivation. McKesson, 496 U.S. at 31. McKesson further directs that a "meaningful backward-looking remedy" requires "a clear and certain remedy which creates in

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[10](...continued)
satisfy RCW 82.32.150, but must also meet the equitable criterion governing an injunction's issuance because "injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law" and Washington law "provides the legal remedy of a refund suit." Id. at 791.

Washington also has an administrative procedure for contesting tax assessments without first paying the contested taxes (see RCW 82.32.160 and WAC 458-20-100) but administrative bodies cannot rule on the constitutionality of statutes. See Yakima County Clean Air Authority v. Glascam Builders, Inc., 85 Wn.2d 255, 534 P.2d 33 (1975). Thus, an administrative hearing process does not provide taxpayers the "meaningful opportunity" to challenge a tax assessment in court prior to paying the disputed taxes as required by McKesson. Moreover, paying the contested taxes prior to filing a refund suit in Thurston County Superior Court is a statutory prerequisite to having the case heard outside the Department's administrative hearing process.

hindsight a nondiscriminatory scheme" and rectifies the unconstitutional deprivation involved. Cambridge State Bank, 514 N.W.2d at 571 (citing McKesson).[11] Under McKesson, the state has three options: (1) a full refund of the unconstitutional taxes collected, (2) a retroactive tax on taxpayers exempted from the tax, or (3) a combination of the two remedies. McKesson, 496 U.S. at 40-41. For Digital, the only option remaining is a full refund of the unconstitutional B&O taxes it paid between January 1, 1983 and August 11, 1987, because the statute of limitations for assessments against [p. 31] other taxpayers has expired for this period, thereby eliminating options (2) and (3). See RCW 82.32.050.

Nor will the 1987 credit law permit the State to avoid giving Digital a refund. The Due Process Clause requires this

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[11]In Cambridge State Bank, the Minnesota State Supreme Court held that Minnesota had not afforded banks a predeprivation remedy sufficient to satisfy the McKesson federal due process standards, because the question of whether a Minnesota taxpayer could pose a constitutional challenge to a state tax without first paying the contested tax was unsettled at the time the banks filed their suit. The Court thus concluded that, at the time the banks initiated their suit, the only certain remedy available to taxpayers was the tax refund statute under which they proceeded.

Court to fashion a remedy which satisfies "minimum federal requirements." McKesson, 496 U.S. at 50-51. And while a state "is free . . . to provide broader relief as a matter of state law than is required by the Federal Constitution," id. at 52 n.36, "under no circumstances may [a state] confine [taxpayers] to a lesser remedy" than the Constitution would afford. Harper, 113 S. Ct. at 2520 (citing McKesson) (emphasis supplied). Any argument that the B&O tax credits established under the 1987 credit law satisfy federal due process requirements fails to acknowledge that the 1987 credit law confines Digital to "a lesser remedy" which is forbidden by both Harper and McKesson.

This conclusion is compelled by the Supreme Court's recent decision in Reich. The Georgia Supreme Court had held that Georgia could tax retirement benefits paid by the Federal Government, [p. 32] but exempt those paid by the State. The U.S. Supreme Court then held that such a scheme violated the Constitution, and remanded the matter to the Georgia courts to determine the appropriate remedy. Georgia then repealed the statute but did not offer federal retirees refunds of the

unconstitutional taxes they had paid before the Court's decision.

The retirees appealed, and the Supreme Court held:

> . . . [U]nder McKesson, Georgia has the flexibility to maintain an exclusively predeprivation remedial scheme, so long as that scheme is "clear and certain." Due process, we should add, also allows the State to maintain an exclusively postdeprivation regime, see, e.g., Bob Jones Univ. v. Simon, 416 U.S. 725, 746-748, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974), or a hybrid regime. A State is free as well to reconfigure its remedial scheme over time, to fit its changing needs. Such choices are generally a matter only of state law.
>
> But what a State may not do, and what Georgia did here, is to reconfigure its scheme, unfairly, in mid-course -- to "bait and switch," as some have described it. Specifically, in the mid-1980's, Georgia held out what plainly appeared to be a "clear and certain" postdeprivation remedy, in the form of its tax refund statute, and then declared, only after Reich and others had paid the disputed taxes, that no such remedy exists. In this regard, the Georgia Supreme Court's reliance on Georgia's predeprivation procedures was entirely beside the point (and thus error), because even assuming the constitutional adequacy of these procedures -- an issue on which we express no view -- no reasonable taxpayer would have thought that they represented, in light of the apparent [p. 33] applicability of the refund statute, the exclusive remedy for unlawful taxes. See generally Rakowski, Harper and Its Aftermath, 1 Fla. Tax Rev. 445, 474 (1993).

Reich, 115 S. Ct. at 550.

This is the precise effect which would result from limiting Digital's remedy to the 1987 credit law. Between 1983 and 1987,

Digital paid B&O taxes to Washington pursuant to an unconstitutional scheme. During these years, Washington held out a "clear and certain" postdeprivation remedy -- its tax refund statute (RCW 82.32.060). But after other taxpayers paid the disputed taxes and successfully challenged them in Tyler Pipe, the Legislature passed the 1987 credit law and declared that no refund remedy existed. Under Reich, application of the 1987 credit law to Digital would constitute an attempt by Washington to reconfigure its scheme, in mid-course -- in short, an unconstitutional "bait and switch" of the sort condemned in Reich.

C. The Superior Court's Refusal to Give Retroactive Effect to TYLER PIPE Disregards the Vital Federal Interest in Preventing Discrimination Against Interstate Commerce by State Tax Statutes.

The last decade has seen the U.S. Supreme Court strike down as unconstitutional an almost . . . .

. . . .

No. 62414-3

SUPREME COURT
OF THE STATE OF WASHINGTON

DIGITAL EQUIPMENT CORPORATION,

Plaintiff/Appellant

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Defendant/Respondent

Appeal From Thurston County Superior Court
Honorable Wm. Thomas McPhee

APPELLANT'S REPLY BRIEF

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. . . . [p. 10]

B. The United States Supreme Court Has Consistently Given the Retroactivity Rule Announced in Harper a Broad Application, as Shown by Its Most Recent Rulings.

In its most recent rulings, the U.S. Supreme Court continues to give the retroactivity rule of Harper a broad application. See Reynoldsville Casket Co. v. Hyde, 514 U.S. ___, 131 L. Ed. 2d 820, 115 S. Ct. 1745 (1995); Ryder v. U.S., __ U.S. ___, 132 L. Ed. 2d 136, 115 S. Ct. 2031 (1995).[6] Reynoldsville is particularly relevant. In that case, plaintiff attempted to bring a negligence action against an out-of-state defendant based on an automobile accident which had occurred more than three years earlier. At the time of the accident, Ohio's statute of limitations for personal injury actions was two years but

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[6]In Reynoldsville, Justice Breyer authored the majority opinion and was joined by Justices Rehnquist, Scalia, Souter, Thomas and Ginsberg. Justice Scalia, joined by Justice Thomas, authored a concurring opinion as did Justice Kennedy, joined by Justice O'Connor. The Department's extended and intricate exercise in "footnote prophecy" concerning how Justice Scalia and others will vote concerning Harper (and how they would have voted had certiorari been granted in National Can II) has been discredited by the actual votes taken in the most recent of these cases. See Brief of Respondent at 27, n.28.

the statute was tolled for claims against out-of-state defendants. 131 L. Ed. 2d at 825. While plaintiff's action was pending, the U.S. Supreme Court in Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 100 L. Ed. 2d 896, 108 S. Ct. 2218 (1988), declared that the Ohio tolling provision placed an unconstitutional burden on interstate commerce. The trial court dismissed the plaintiff's action; the Ohio Supreme Court then reinstated it, ruling that Bendix could not be retroactively applied to actions arising before the Bendix decision. Id. [p. 11]

The U.S. Supreme Court reversed the Ohio court's prospective application of the rule in Bendix as a violation of the Constitution's Supremacy Clause (art. VI, § 2). The plaintiff argued that the issue was not one of retroactivity, and that the Ohio Supreme Court was merely exercising "a degree of legal leeway in fashioning remedies for constitutional ills." Reynoldsville, 131 L. Ed. 2d at 826. The plaintiff further argued that Chevron Oil should still be applied by recharacterizing it as a case in which the Court took reliance interests into account in fashioning an appropriate remedy for a violation of a federal law. Id.

The Court, however, held that the Ohio Supreme Court could not change the legal outcome dictated by the Supremacy Clause in Bendix by calling its refusal to give retroactive effect to the federal law an effort to provide a remedy. The Court also rejected the invitation to revive Chevron Oil by broadly distinguishing between retroactivity and remedies:

> One serious problem with Hyde's argument lies in the Ohio Supreme Court's legal description of why, in fact, it refused to dismiss Hyde's case. As we have pointed out, the Ohio Supreme Court's syllabus (the legally authoritative statement of its holding) speaks, not about remedy, but about retroactivity. Regardless, we do not see how, in the circumstances before us, the Ohio Supreme Court could change a legal outcome that federal law, applicable under the Supremacy Clause, would otherwise dictate simply by calling its refusal to apply that federal law an effort to create a remedy. The Ohio Supreme Court's justification for refusing to dismiss Hyde's suit is that she, and others like her, may have reasonably relied upon pre-*Bendix* law -- a reliance of the same kind and degree as that involved in *Chevron Oil*. But, this type of justification -- often present when prior law is overruled -- is the very sort that this Court, in *Harper*, found insufficient to deny retroactive application of a new legal rule (that had been applied in the case that first announced it). If *Harper* has anything more than symbolic significance, how could virtually identical reliance, without more, prove sufficient to permit a virtually identical denial [p. 12] simply because it is characterized as a denial based on "remedy" rather than "non-retroactivity"?

Reynoldsville, 131 L. Ed. 2d at 826, 827 (emphasis supplied).

Finally, the Court rejected the invitation to grant wide latitude to state courts within the area of remedies. Elaborating on its decision in McKesson, the Court explained that where a violation involved the different treatment of two similar classes of individuals under state tax laws, a state could cure the problem by either taxing both groups (i.e., imposing back taxes on the previously advantaged group), or by taxing neither (and refunding back taxes to the disadvantaged group), such as was the case in Davis. Although the state would not have to refund taxes in the first situation, "[t]hat result flows not from some general 'remedial' exception to 'retroactivity' law, but simply from the fact that the state law that the taxpayer had attacked now satisfies the Constitution." Reynoldsville, 131 L. Ed. 2d at 828. Moreover, the Court went on to state that, if a state collects taxes under a taxing statute which is later held by the U.S. Supreme Court to be unconstitutional, the retroactive application of the Court's ruling would entitle taxpayers to a refund of the taxes illegally paid; the Court then indicated that a refund could be refused only under a preexisting, independent rule of state law which has nothing to do

with retroactivity and which also satisfied procedural due process requirements. Id. at 828-29.[7] [p. 13]

In short, Reynoldsville confirms that Chevron Oil no longer constitutes a viable statement of retroactivity law in civil cases. Reynoldsville is also directly applicable to this case. Both in Reynoldsville and this case, the issue is the retroactive application of a new rule of federal law. This Court cannot change the legal outcome dictated by the Commerce Clause in Tyler Pipe by calling its refusal to retroactively apply the rule a remedy, any more than could the Ohio Supreme Court in Reynoldsville change the legal outcome dictated by the Supremacy Clause in Bendix. Finally, Reynoldsville clearly warns that, if a state collects taxes under a taxing statute later held by the U.S. Supreme Court to be unconstitutional, the rule of law is to be applied retroactively such that the remedy of a refund may only be refused under very limited circumstances. As is discussed below, the only alternative

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[7]Between 1983 and 1987, the only remedy available to taxpayers in Washington who paid an unconstitutional tax, was a full refund of those taxes paid. RCW 82.32.060; see RCW 82.32.170 & .180. The 1987 Credit Law, came into existence on August 12, 1987, and for reasons directly related to this Court's decision in Tyler Pipe.

basis urged by the Department for refusing a refund to Digital -- retroactive application of the 1987 Credit Law -- does not qualify as one of those circumstances.

C. Recent Decisions of the Lower Federal Courts Follow the Rule in Harper and Require the Retroactive Application of New Rules of Federal Law.

The Department claims that the lower federal courts have not understood Harper to have adopted the express reservation test, citing Holt v. Shalala, 35 F.3d 376 (9th Cir. 1994), and Pettijohn v. Shalala, 23 F.3d 1572 (10th Cir. 1994) (per curiam). In Holt, a three-judge panel of the . . . .

. . . . [p. 16]

U.S. v. Real Property, at 1405-06 (emphasis supplied).[8]

Thus, contrary to the Department's claim, lower federal courts have recognized that the federal retroactivity rule in Harper effectively abrogated Chevron Oil. These decisions are in accord with Digital's conclusion that the only time a decision might apply

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[8]The U.S. Supreme Court in Tyler Pipe similarly remanded the matter to this Court for the application of its holding to the taxpayers in that case.

"purely prospectively" is when the U.S. Supreme Court expressly reserves the question, which it did not do in Tyler Pipe.

D. Digital Is Entitled to a Refund of All B&O Taxes Illegally Collected Between January 1, 1983, and August 11, 1987.

1. Due Process Mandates Digital Be Provided Meaningful Backward-Looking Relief, Which in This Case Is a Refund of All Unconstitutional Taxes Paid. Digital recognizes that retroactive application of Tyler Pipe does not automatically result in a refund of the illegally collected tax. Rather, as stated by the Court in Harper (citing the approach established in McKesson), retroactive application of Tyler Pipe requires the fashioning of a remedy which provides relief consistent with due process principles.

The Department argues that the "[r]etroactive application of the 1987 Credit Law to the interim period provides Digital Equipment all the relief federal due process requires." Brief of Respondent at 18. The Department further argues that McKesson allows the state to retain the taxes levied upon Digital during the interim period because the 1987 Credit Law lawfully deprived Digital of its property pursuant to a tax [p. 17] scheme (the 1987

Credit Law) that is valid under the Commerce Clause. Brief of Respondent at 18, 19. In support of this position, the Department quotes the following portion of McKesson:

> [A] State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination. Florida may reformulate and enforce the Liquor Tax during the contested tax period *in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause*. Having done so, *the state may retain the tax appropriately levied upon petitioner pursuant to this reformulated scheme* because this retention would deprive petition of its property pursuant to a tax scheme *that is valid under the Commerce Clause*. 496 U.S. at 39-40.

Brief of Respondent at 18 (quoting McKesson, 496 U.S. at 39-40) (retaining edits and emphasis of the Department).

The Department misreads McKesson. While it is true the state has a degree of flexibility to respond to the announcement of a new federal rule, including the reformulation of the offending tax law, the enforcement of that law must treat the taxpayer and its competitors "in a manner consistent with the dictates of the Commerce Clause." Id. In this case, the retroactive application of the 1987 Credit Law will do nothing to change the fact that

Digital paid the unconstitutional B&O tax while its competitors did not.[9]

The retroactive application of the 1987 Credit Law to Digital would therefore continue to treat Digital and its in-state competitors in a [p. 18] manner inconsistent with the dictates of the Commerce Clause. In other words, Digital would remain burdened with the tax under the 1987 Credit Law while its competitors would remain unburdened. See Reynoldsville, 131 L. Ed. 2d at 838. Harper mandates that under no circumstances may a state confine payers of an unconstitutional tax to a lesser remedy in fashioning postdeprivation relief. 113 S. Ct. at 2510.[10] Hence,

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[9]Under former RCW 82.04.440, instate manufacturers received an "automatic" exemption from the retailing or wholesaling B&O taxes, whereas out-of-state manufacturers (like Digital) did not. The Department's argument would require Digital to apply for credits to equalize the tax disparity. No such requirement is placed on instate manufacturers because they continue to benefit from the unconstitutional exemption granted by former RCW 82.04.440.

[10]This disparity in treatment was also recognized by this Court in American National Can, supra. The court acknowledged that taxpayers had applied for $1,304,000 worth of credits under the 1987 Credit Law which was "a small fraction" of the total tax the state collected from interstate manufacturers, but the court dismissed this inequality stating "[t]axpayers' argument can only be understood as a complaint about the magnitude of the effect."

(continued...)

the discrimination continues and Digital would clearly be confined to a lesser remedy should it be limited to the relief afforded by the 1987 Credit Law.[11] The Constitution simply does not permit such a result.

The Department also omits the paragraph which follows the section of McKesson on which it relies and quotes. There, the Court goes on to explain:

> More specifically, the State may cure the invalidity of the Liquor Tax by refunding to petitioner the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received. Cf. Montana National Bank and Bennett (curing discrimination through such refunds). Alternatively, to the extent consistent with other constitutional restrictions, the State may assess and collect back [p. 19] taxes from petitioner's competitors who

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[10](...continued)
Id. at 246-47. The "magnitude of the effect" is, however, very relevant under McKesson in light of Harper; in other words, a state cannot refuse a refund just because the result would only be "a little bit" unconstitutional.

[11]In fact, as discussed more fully below, Digital is not even eligible for relief under the 1987 Credit Law by the plain terms of that law. The U. S. Supreme Court, and only the U. S. Supreme Court, can issue the necessary "judgment not subject to review" holding that retroactive relief is appropriate under Tyler Pipe; as this Court is well aware, the U.S. Supreme Court has never issued such a ruling which means the law, by its terms, affords no relief to Digital. See § II.D.2, infra at 20-23.

> benefitted from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme. Cf. Bennett, 284 US, at 247, 76 L Ed 265, 52 S Ct 133 (suggesting State could erase the unconstitutional discrimination by "collecting the additional taxes from the favored competitors"). Finally, a combination of a partial refund to petitioner and a partial retroactive assessment of tax increases on favored competitors, so long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce, would render petitioner's resultant deprivation lawful and therefore satisfy the Due Process Clause's requirement of a fully adequate postdeprivation procedure.

McKesson, 496 U.S. at 40-41 (emphasis supplied). The 1987 Credit Law does not satisfy this test.

In addition, the Department's interpretation of McKesson is inconsistent with the U.S. Supreme Court's recent decision in Reynoldsville. In Reynoldsville, the Court explained the "special circumstances of the tax cases":

> Where the violation depends, in critical part, upon differential treatment of two similar classes of individuals, then one might cure the problem either by similarly burdening, or by similarly unburdening, both groups. Where the violation stemmed from, say, taxing the retirement funds of one group (retired Federal Government employees) but not those of another (retired state government employees), see *Davis v. Michigan Dept. of Treasury*, 489 US 803, 103 L Ed 2d 891, 109 S Ct 1500 (1989), then the State might cure the problem either (1) by taxing both (imposing, say, back taxes on the previously

> advantaged group, to the extent constitutionally permissible), or (2) by taxing neither (and refunding back taxes). Cf. *McKesson Corp., supra*, at 40-41 and n 23, 110 L Ed 2d 17, 110 S Ct 2238. And, if the State chooses the first, then the taxpayers need receive no refund. But, that result flows not from some general "remedial" exception to "retroactivity" law, but simply from the fact that the state law that the taxpayer had attacked now satisfies the Constitution.
>
> . . . .
>
> But what if a pre-existing, separate, independent rule of State law, having nothing to do with retroactivity -- a rule containing certain [p. 20] procedural requirements for any refund suit -- nonetheless barred the taxpayers' refund suit. See *McKesson Corp., supra*, at 45, 110 L Ed 2d 17, 110 S Ct 2238; *Reich* v. *Collins*, 513 U.S. ___, ___, 130 L Ed 2d 454 115 S Ct 54 (1994). Depending upon whether or not this independent rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim.

131 L. Ed. 2d at 828-29 (citations omitted in part).

In short, Reynoldsville has extended Reich v. Collins, by indicating that the Due Process Clause limits the ability of a state to substitute one remedy for another by requiring neutrality and independence in effecting that substitution. Put another way, a state fails the Reich/Reynoldsville approach if it effects the substitution "after the fact" to avoid having to pay a refund. As

will now be shown, retroactive application of the 1987 Credit Law cannot pass muster under this test.

2. **Despite the Holding in AMERICAN NATIONAL CAN, the 1987 Credit Law Cannot Be Applied Retroactively to Digital**. The Department relies heavily on certain statements by this Court in American National Can to justify the state's refusal to provide Digital a refund of the unconstitutional taxes it paid. Specifically, the Department cites this Court's reference to section 3 of the 1987 Credit Law which states:

> If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that relief is appropriate for any tax reporting periods before the effective date of this act, in respect to RCW 82.04.440 as it existed before the effective date of this act, it is the intent of the legislature that the credits provided in RCW 82.04.440 as amended by section 2 of this act shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credits.

Laws of 1987, 2d Ex. Sess., ch. 3, § 3; see American National Can at 250, 251. [p. 21]

Although included as section 3 in the bill, this section was not codified as part of the 1987 Credit Law. Instead, this language appeared in the Code Reviser's notes as part of the legislative findings and intent. Closer review, however, discloses that this

language is actually a legislative "statement of desire" that taxpayers never receive any credits for unconstitutional taxes paid prior to the effective date of the 1987 Credit Law -- unless the U.S. Supreme Court at some future time issues a decision requiring relief under Tyler Pipe for a tax reporting period prior to the issuance of the decision in Tyler Pipe. Since the only "court of competent jurisdiction" which can issue "a judgment not subject to review" is the U.S. Supreme Court, only a decision by the U.S. Supreme Court can trigger application of the credit law to prior tax reporting periods.[12]

In other words, application of the 1987 Credit Law to prior tax reporting period taxpayers would be triggered only if the U.S. Supreme Court granted a petition for a writ of certiorari to review a decision of this Court, and then held that Tyler Pipe applied to prior reporting periods. The effect of that contingency is to deprive a refund to prior reporting period taxpayers. Given the well-known fact that in 1987 the Supreme [p. 22] Court was

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[12]This Court has, of course, recognized that the U.S. Supreme Court has the final review authority over all state court decisions touching upon federal rights. State v. Chrisman, 100 Wn.2d 814, 676 P.2d 419 (1984).

granting "cert" petitions in under five percent of cases,[13] the only fair conclusion to draw from the Legislature's very precise language is that it : (1) expected this Court to hold that Tyler Pipe would not be given retroactive effect; (2) also expected that the U.S. Supreme Court would then deny a petition for a writ of certiorari to review that decision; and therefore (3) adopted the retroactive application "statement of desire" as an "insurance policy" against the risk of a refund in the unlikely event the Court granted review and required that Tyler Pipe be retroactively applied.[14] To date, the Legislature's gamble has paid off -- there

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[13]R. Stern, E. Gressman & S. Schapiro, Supreme Court Practice, § 4.1 at 190, n.7 (6th ed. 1986) ("In recent years, about 95 percent of the petitions for certiorari are denied, with the proportion of denials steadily increasing"). It is fair to say that the very long odds for getting U.S. Supreme Court review is one of the few things concerning Supreme Court practice about which the educated lay public is aware.

[14]It should be noted that the denial of certiorari by the U.S. Supreme Court would also be considered a "judgment not subject to review" which would bring into play the contingencies set forth in the "statement of desire." In other words, the Department would undoubtedly take the position that if the U.S. Supreme Court denies certiorari with regard to this case, that denial would be a judgment not subject to review and Digital and other taxpayers would therefore not be entitled to the credits provided in RCW 82.04.440 under the 1987 Credit Law. This ruling would

(continued...)

has yet to be a U.S. Supreme Court decision requiring retroactive application of Tyler Pipe. This also means that, under the plain language of the statute, Digital is not even eligible for the "remedy" which the 1987 Credit Law provides. E.g., Western Petroleum Importers, Inc. v. Friedt, Washington Supreme Court Cause No. 62771-1 (August 10, 1995) at 2.

In short, the 1987 Credit Law, as evidenced by the Legislature's "statement of desire", is a variant of the "bait and switch" tactics [p. 23] condemned by the U.S. Supreme Court in Reich v. Collins, ___ U.S. ___, 130 L. Ed. 2d 454, 115 S. Ct. 547 (1994). In Reich, the Court held that Georgia could not ". . . hold out what plainly appeared to be [a] clear and certain postdeprivation remedy and then declare, only after the disputed taxes were paid, that no such remedy existed." Reich, 115 S. Ct. at 547.[15] Since Reich, the Court in Reynoldsville expressed

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[14](...continued)
then be res judicata and arguably cut off all claims of similarly situated litigants.

[15]Reich is a unanimous decision authored by Justice O'Connor, who authored the dissent in Harper. The Department's attempts to predict the course of jurisprudence on federal retroactivity law (continued...)

strong presumptive reservations about any after-the-fact attempt to take away a refund and substitute some other -- lesser -- remedy. Here, the credit law clause on which the Department relies is only triggered by a decision of the U.S. Supreme Court holding that Tyler Pipe must be given retroactive effect -- precisely the sort of tactic condemned by Reich and Reynoldsville. In light of these latter two cases, nothing in American Can (which did not even involve a claim for relief from taxes paid prior to Tyler Pipe) warrants giving retroactive application of the credit law.

E. The Superior Court Properly Struck the Affidavit Filed by the Department in Response to Digital's Motion for Reconsideration.

The Department claims the trial court erred by striking an affidavit filed by the Department in response to Digital's reconsideration motion. In Estate of Jordan v. Hartford Acc. & Indem. Co., 120 Wn.2d 490, 844 P.2d 403 (1993), this Court held it will normally not review any issues not presented in the petition for review or the answer. 120 Wn.2d at 496. . . .

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[15](...continued)
(see Respondent's Brief at 27, n.28) also does not address the evolution of Justice O'Connor's philosophy in this area.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DIGITAL EQUIPMENT CORPORATION,	)
	)
Plaintiff,	)
v.	)
	)
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,	)
	)
	)
Defendant.	)
	)

CERTIFIED TRANSCRIPT OF
VIDEOTAPED PROCEEDINGS

OCTOBER 27, 1995

ORAL ARGUMENTS

FOR THE PLAINTIFF, MICHAEL KING

FOR THE DEFENDANT, DONALD COFER, AAG

[FURTHER EXTRACTS FROM TRANSCRIPT,
SUPPLEMENTING THOSE TO BE FOUND
IN APPENDIX TO PETITION FOR
WRIT OF CERTIORARI,
AT 69a-74a]

. . . . [P. 12]

. . . [MR. KING] here and had said in, say, 1989 or 1990, we want you to voluntarily dismiss your suit, and when Digital refused that, if the Department had brought a motion -- that actually happened, we were asked to voluntarily dismiss our suit. We declined because we knew that the McKesson case was pending and American Trucking v. Smith was pending. We wanted to see the outcome of those cases.

But the Department could have gone into court the next day, filed a motion to dismiss, we probably would have gone down in flames, and that would have been the end of the matter. Then our situation would be like all of those other cases that the Department discusses, the post-Digital filing cases that have been finally disposed of. But that's the whole point, they have been finally disposed of. They're not similarly situated cases.

Now --

JUSTICE PEKELIS: What about the remedy question in light of your particular non-double payment of tax?

MR. KING: Well, in light of our particular non-double payment of tax, the question becomes whether somehow that

means that you can say that the Chevron Oil rule can be given effect on the remedy side and we can be deprived of a refund because we didn't pay a double tax.

Again, I say that ignores the discrete injury that we had money taken away from us, our money that was [p. 13] collected in violation of law. There was not proper authority to collect that tax.

Now, the United States Supreme Court has laid out that the due process clause imposes an independent duty to refund under those circumstances, unless, unless, and there are three exceptions.

The first exception is if the state provided an alternative pre-deprivation remedy to the --

JUSTICE TALMADGE: Counsel, before you go through that.

MR. KING: Yes.

JUSTICE TALMADGE: In this particular circumstance, the litigants had actually litigated Tyler Pipe who paid the double tax that was found to be violative of the commerce clause. They didn't get a refund. They got the remedy that was provided for them by the legislature. The remedy was challenged on

constitutional grounds and upheld. Doesn't that mean that the only remedy that you can seek, even if Tyler Pipe is retroactive to your circumstance, is exactly the remedy everybody else got?

MR. KING: No, Your Honor, because in American National Can II, the challenge was on state and federal grounds. The federal grounds were not the federal grounds that were being advanced here. The claimants did not come into court and say, the retroactivity law has changed.

. . . . [p. 18]

. . . [MR. KING] yet been made by the United States Supreme Court, because it has not issued that judgment, and therefore the condition precedent has not been satisfied. But even if you determine that state law means the credit law as a matter of state law applies, you have a federal law problem.

I know I'm going a little bit over into my time, but I want to get directly to this point. Your federal law problem is a due process one. Because, as Reynoldsville makes clear, you may not kick out after the fact a refund unless you do it under a preexisting, separate and independent rule of state law having nothing to do with retroactivity. And, Your Honors, this is the

antithesis of it. This is an after-the-fact law. It was adopted after Digital paid its taxes.

This is not a separate and independent rule having nothing to do with retroactivity. The Department's whole argument is that if you give Digital retroactive effect, the credit law kicks in and suddenly the refund rug is pulled out from under us. I submit that is precisely the sort of reconfiguration in midstream, . . . precisely the sort of bait and switch that was condemned in Reich v. Collins.

Your Honors, our injury is the deprivation of our property without due process of law because this tax was [p. 19] collected illegally. We ask that you reverse and remand for the determination of the appropriate amount of the refund.

And I will reserve the balance of my time.

CHIEF JUSTICE DURHAM: Thank you, Counsel.

MR. COFER: Good morning, Chief Justice Durham, Members of the Court. I am Donald Cofer, Assistant Attorney General. I'm here representing the State of Washington this morning.

First of all, I wish to give the Court a brief overview as to why the judgment of the Superior Court should be affirmed in this

case. I will then discuss the issues involved in the second refund period Digital Equipment has sought refunds for. And, finally, I will discuss the first refund period and the issues involved in that.

Digital Equipment, here this morning, is seeking full refunds of all wholesaling and retailing taxes it paid during two tax periods. The first is from January 1st of 1983, until June 23rd of '87. The second period is from June 23rd of '87 to 8/11/87.

Now, the relief that Digital Equipment is seeking for those periods is barred by the combined effect of two previous decisions of this Court, National Can II on remand from Tyler Pipe, and American National Can. Both . . . .

. . . .

WAC 458-20-228

. . . .

(8) **Stay of collection.** RCW 83.32.200 provides, "When any assessment or additional assessment (of taxes) has been made, the taxpayer may obtain a stay of collection, under such circumstances and for such periods as the department may by general regulation provide, of the whole or any part thereof, by filing with the department a bond in an amount, not exceeding twice the amount on which stay is desired, and with sureties as the department deems necessary, conditioned for the payment of the amount of the assessments, collection of which is stayed by the bond, together with the interest thereon at the rate of one percent of the amount of such assessment for each thirty days or portion thereof from the due date until paid."

(Note: RCW 82.32.190 authorizes issuance of an order by the department holding in abeyance tax collection during pendency of litigation. Such tax might be that due on excise tax returns or tax due for unaudited periods for which no assessment has been issued. If, however, an assessment has been issued and is unpaid, RCW 82.32.200, not RCW 82.32.190, is the operative statute for stay of collection with respect to such an assessment.)

(a) The department will give consideration to a request that it grant a stay of collection if:

(i) Written request for the stay is made prior to the due date for payment of the tax assessment, and

(ii) Payment of any unprotested portion of the assessment and other taxes due is timely made, and

(iii) The requested stay is accompanied by an offer of a cash bond, or the offer of a security bond, the conditions of which are guaranteed by a specified authorized surety insurer; in either case the amount of the bond will ordinarily be set in an amount equal to the assessment or portion thereof for which stay

is requested together with interest thereon at the rate of one percent per month, but in appropriate cases the department may require a bond in an increased amount not to exceed twice the amount for which stay is requested.

(b) The department will grant a stay of collection only when it is satisfied and determines that it is in the best interests of the state to do so. Factors which it will consider in making this determination include: The existence of 1. a constitutional issue to be litigated by the taxpayer the resolution of which is uncertain; 2. a matter of first impression for which the department has little precedent in administrative practice; and 3. an issue affecting other similarly situated taxpayers for whom the department would be willing to stay collection of the tax.

(c) Claims of financial hardship or threat of litigation are not grounds which would justify the granting of a stay of collection. However, the department will consider a claim of significant financial hardship as grounds for staying collection procedures, but this will be done only if a partial payment agreement is executed and kept in accordance with the department's procedures and with such security as the department deems necessary.

(d) If the department grants a stay of collection, the stay will be for a period of no longer than two calendar years from the date of acceptance of the taxpayer request therefor or thirty days following a decision not appealed from by a tribunal or court of competent jurisdiction upholding the validity of the tax assessed, whichever date occurs first. The department may extend the period of a stay originally granted, but only for good cause shown.

. . . .

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

AMERICAN NATIONAL CAN CORPORATION, et al.,	)	
Plaintiffs,	)	NO. 88-2-00680-3
vs.	)	ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, and WILLIAM R. WILKERSON,	)	
Defendants.	)	

THIS MATTER came on regularly for hearing before the Honorable Paula Casey, Judge of the Superior Court, on May 12 and May 19, 1988 on the motion of the plaintiffs for a preliminary injunction.

The plaintiffs, American National Can Corporation, et al. were represented by BOGLE & GATES, by James R. Johnston. The defendant, State of Washington, Department of Revenue, was represented by KENNETH O. EIKENBERRY, Attorney General, and William B. Collins, Assistant Attorney General.

The Court, having considered the pleadings and affidavits and having heard the arguments of counsel and having [p. 2] entered Findings of Fact and Conclusions of Law, and being fully advised now makes its Order as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion of the plaintiff for preliminary injunction is denied.

DATED this 23rd day of May, 1988.

/S/
PAULA CASEY, JUDGE

Presented by:

/S/
William B. Collins
Assistant Attorney General
Attorney for Defendants

Approved as to Form;
Notice of Presentation
Waived:

Approved Via Telephone 5/23/88
/S/ Wm. B. Collins
James R. Johnston
Attorney for Plaintiffs

THE SUPREME COURT OF WASHINGTON

AMERICAN NATIONAL CAN CORPORATION, et al.,	)	
Petitioners,	)	No. 55180-4
v.	)	RULING DENYING MOTION FOR DISCRETIONARY REVIEW
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, et al.,	)	
Respondents.	)	

In an action pending in Thurston County Superior Court, American National Can Corporation and more than 70 other companies doing business in Washington have challenged the present version of this state's business and occupation tax on the ground that it unconstitutionally discriminates against interstate commerce. The plaintiffs below now seek direct discretionary review of a Superior Court decision denying their motion for a preliminary injunction. I conclude that the request must be denied.

The specific relief which the petitioners requested of the trial court was that they be permitted to pay disputed B & O taxes into an escrow. Pointing to this court's recent decision in

National Can Corp. v. Department of Revenue, 109 Wn.2d 878, 749 P.2d 1286 (1988), cert. den. ___ U.S. ___ (June 6, 1988) (National Can II), they urge that this payment device is necessary to protect their right to a tax refund, should their challenge to the tax ultimately prove successful. Without this protection, they fear, the State will spend the tax receipts and [p. 2] in so doing create a "hardship" with which to justify a prospective application only of any decision invalidating the tax.

Petitioners' argument is not without attraction as a matter of apparent fairness. As they recognize, however, to be entitled to the equitable relief of a preliminary injunction against the collection of a tax they must meet a well-established three-part test.[1] They must demonstrate: a clear legal or equitable right, a well-grounded fear of immediate invasion of that right, and actual and substantial injury which would result from the invasion. Tyler Pipe Industries, Inc. v. Department of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982). The trial court here found that, as to taxes due under the present B & O tax scheme, the petitioners had not

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[1]Petitioners concede that the escrow proposal would be a species of preliminary injunction.

satisfied the first of these requirements because they are unlikely to prevail on the merits. See id., at 793. I agree.

The portion of the current tax structure which petitioners challenge was adopted by the Legislature in response to the Supreme Court's 1987 decision holding the prior B & O tax scheme unconstitutional. Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 483 U.S. ___, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987). That decision disapproved of the "multiple activities" exemption of that prior tax structure. The Court also suggested explicitly, however, that a system containing a credit for like taxes paid to other states would pass constitutional muster. Id., 107 S. Ct., at 2821. The [p. 3] Legislature has now substituted such a credit system for the unconstitutional exemptions.[2]

Petitioners describe the Supreme Court's discussion of credits in Tyler Pipe as dicta, a characterization also employed

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[2]The petitioners have also challenged the collection of tax for a brief interim period between the date of the Supreme Court decision and the effective date of the new legislation. Though the trial court found petitioners likely to prevail on this point, it nonetheless denied the preliminary injunction because the potential refund amounts are not so large as to expose petitioners to the type of "hardship" argument adverted to earlier. This portion of the trial court's decision is of incidental interest only at this stage. The dispute of significance concerns collections under the new tax.

by this court in National Can II. Petitioners have also devised an elaborate and supportable argument that the new B & O tax credit system merely perpetuates the discrimination against interstate commerce identified and disapproved in Tyler Pipe. Even as dicta, however, the credit suggestion still represents the Supreme Court's most recent assistance on the problem of adapting the B & O tax to satisfy an evolving constitutional standard. And the petitioners' discrimination theory, while plausible, is matched by the State's well-constructed arguments supporting the constitutionality of the new tax structure.

In short, I conclude that the trial court properly assessed the merits of petitioners' challenge, and correctly found no likelihood of success that might qualify as a clear legal or equitable right. On this basis alone, the trial court's denial of the preliminary injunction was neither obvious nor probable error, as would be necessary to warrant discretionary review. RAP 2.3 (b)(1) and (2). [p. 4]

The motion for discretionary review is denied.

DATED at Olympia, Washington, June 16, 1988.

/S/ Geoffrey Crooks
COMMISSIONER

THE SUPREME COURT OF WASHINGTON

AMERICAN NATIONAL CAN CORPORATION, ET AL.	)	
Petitioners,	)	No. 55180-4
v.	)	ORDER DENYING MOTION TO MODIFY COMMISSIONER'S RULING
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, ET AL.	)	
Respondents.	)	

This matter came on before the Court on its July 5, 1988, Motion Calendar on Petitioner's Motion to Modify Commissioner's Ruling. The Court having considered the motion and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petitioner's Motion to Modify Commissioner's Ruling is denied.

DATED at Olympia, Washington this 5th day of July, 1988.

/S/ Robert F. Utter
ACTING CHIEF JUSTICE